Supreme Court, U.S.
FILED

(1) 941072 DEC 15 1994

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE, and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

BRUCE A. OLSEN
Assistant Attorney General
Counsel of Record

ROBERT A. SELK
Acting Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2580

Attorneys for Petitioners

December 15, 1994

139 PP

QUESTIONS PRESENTED

The public employer's motion for summary judgment claiming a federal right to qualified immunity was denied in a case where the public employee claimed violation of his First Amendment right to free speech. The questions presented relate to the ability of the public employer to lawfully discharge an employee who held the highest position in the agency and served at the pleasure of the employer when the employer was faced with facts that led to a reasonable belief that (1) the employee had seriously mismanaged the agency and (2) the employee's speech was not on a matter of public concern. The questions presented are:

1. Did the Wisconsin Supreme Court create a standard for deciding qualified immunity on summary judgment different than that permitted by the United States Supreme Court by holding, in effect, that a public employer cannot reasonably believe that an employee discharge following alleged free speech activity is lawful if there is any interpretation of the facts which would support a conclusion that the discharge was in retaliation for the exercise of First Amendment rights?

2. Is a public employer entitled to qualified immunity if he considers facts known at the time of the discharge which overwhelmingly support a reasonable belief that a high level at-will employee had seriously mismanaged the agency and undermined its mission, or must he ignore these facts unless the mismanagement was "related" to the employee's speech?

LIST OF PARTIES

The parties to the trial court proceedings below were the petitioners James R. Klauser, Eugene G. Martin, Edward E. Hales, Maureen J. Busby, Richard H. Lillie, and Nicholas Hurtgen, the respondent Marshall Burkes, defendant and third-party plaintiff M. William Gerrard, and third party-defendants Acceleration National Insurance Company and Rural Mutual Insurance Company.

M. William Gerrard, Acceleration National Insurance Company, and Rural Mutual Insurance Company were not parties to the Wisconsin Supreme Court proceeding, and are not interested parties in this petition for certiorari.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

A. Statement of Facts 4

B. How the Federal Question Was Presented 8

C. The Wisconsin Supreme Court's Analysis of the Public Employer's Duty 9

REASONS FOR GRANTING THE WRIT 15

I.

The Wisconsin Supreme Court's Qualified Immunity Standard Deprives Public Employers of the Protection that Qualified Immunity is Designed to Assure, and Will Inhibit Employers from Fearlessly Exercising Reasonable Judgments to Ensure Effective Agency Operations, by Forcing Them to Ignore What They Know About the Employee's Speech and

Performance, and Forcing Them to Trial Whenever a Set of Inferences Raises the Possibility that the Employee was Engaging in Protected Speech. 15

II.

Certiorari Should be Granted to Give State and Federal Courts Guidance About How Qualified Immunity Defenses are to be Analyzed Where the Court Must Consider the Objectively Reasonable Belief of the Decisionmaker to Decide a Motion for Summary Judgment. 24

III.

The Wisconsin Supreme Court's Decision Creates a Precedent Which will Undermine First Amendment Jurisprudence if Unreviewed Because it Creates a Different Standard for Qualified Immunity Analysis in State Courts Considering the Qualified Immunity Defense. 27

CONCLUSION 30

INDEX TO APPENDIX

Wisconsin Supreme Court decision, June 24, 1994 . . . . . App. 1

Wisconsin Supreme Court reconsideration order, September 21, 1994 . . . . . App. 47

Wisconsin Court of Appeals decision, March 10, 1993 . . . . . App. 47

Wisconsin Court of Appeals decision, January 12, 1993 ..... App. 55

Dane County Circuit Court decision denying summary judgment motion, September 1, 1992 ..... App. 58

Wisconsin Court of Appeals decision denying leave to appeal from denial of motion to dismiss, February 5, 1991 ..... App. 83

Dane County Circuit Court decision denying motion to dismiss, January 21, 1991 ..... App. 84

Excerpts of Marshall Burkes' deposition relating the content of his statements to the Investment Board trustees, from Affidavit of Bruce A. Olsen ..... App. 94

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Creighton,
483 U.S. 635 (1987) 16, 17, 25, 26

Bartlett v. Fisher,
972 F.2d 911 (8th Cir. 1992) 20, 29

Benson v. Allphin, 786 F.2d 268 (7th Cir.),
cert. denied, 479 U.S. 848 (1986) 20, 29

Callaway v. Hafeman,
832 F.2d 414 (7th Cir. 1987) 12

Connick v. Myers,
461 U.S. 138 (1983) 10, 20, 27

Cross v. City of Des Moines,
965 F.2d 629 (8th Cir. 1992) 25

Davis v. Scherer,
468 U.S. 183 (1984) 16

Egger v. Phillips, 710 F.2d 292 (7th Cir.)
(en banc), cert. denied,
464 U.S. 918 (1983) 10

Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991),
cert. denied, ___ U.S ___,
112 S.Ct. 1242 (1992) 23

Felder v. Casey, 487 U.S. 131 (1988) 27, 29

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16, 28

Hesse v. Bd. of Educ. of Tp. High School Dist. 211, 848 F.2d 748 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989) . . . 11, 13, 22

Hunter v. Bryant, 502 U.S 224, 112 S.Ct. 534 (1991) 16, 24, 25

Jeffries v. Harleston, 21 F.3d 1238 (2d Cir.1994), *cert. granted, judgment vacated, case remanded sub nom. Harleston v. Jeffries*, ___ U.S. ___, 63 USLW 3385, 1994 WL 388592 (U.S.) (1994) 26

Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985) 12

Malley v. Briggs, 475 U.S. 335 (1986) 16

Marquez v. Turnock, 967 F.2d 1175 (7th Cir. 1992) 11, 23

McDonnell v. Cournia, 990 F.2d 963 (7th Cir. 1993) 25

Mitchell v. Forsyth, 472 U.S. 511 (1985) 16

Mount Healthy City School District v. Doyle, 429 U.S. 274 (1977) 22, 26

Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251 (7th Cir. 1985) 11

Pickering v. Board of Education, 391 U.S. 563 (1968) 13, 18, 19, 20 21, 22, 23, 25, 26, 27

Pierson v. Ray, 386 U.S. 547 (1967) 15

Rakovich v. Wade,
850 F.2d 1180 (7th Cir.) (en banc),
cert. denied, 488 U.S. 968 (1988) 28

Rankin v. McPherson, 483 U.S. 378,
reh'g denied, 483 U.S. 1056 (1987) 28

Vukadinovich v. Bartels,
853 F.2d 1387 (7th Cir. 1988) 10

Waters v. Churchill, ___ U.S ___, 114 S.Ct. 1878,
128 L.Ed.2d 686 (1994) 11, 12, 19, 26, 27

Yoggerst v. Stewart,
623 F.2d 35 (7th Cir. 1980) 12

Zaky v. U.S. Veterans Administration,
793 F.2d 832 (7th Cir.),
cert. denied, 479 U.S. 987 (1986) 10

Statutes

28 U.S.C. § 1257(a) 3

42 U.S.C. § 1983 ..... 3, 8, 29

Sec. 15.76, Wis. Stats. 4

Sec. 25.15, Wis. Stats. 4

Sec. 25.156(2), Wis. Stats. 5

Constitutional Provisions

U.S. Const. Amendment 1 3

U.S. Const. Amendment 14 3

No.

In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE, and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

The petitioners James R. Klauser, Eugene G. Martin, Edward E. Hales, Maureen J. Busby, Richard H. Lillie, and Nicholas Hurtgen respectfully request that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court, denying them qualified immunity on respondent Marshall Burkes' First Amendment retaliation claim, entered in the above-entitled proceeding on June 24, 1994.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported at 185 Wis. 2d 309, 517 N.W.2d 503 (1994), and is reprinted in the Appendix at App. 1. The September 21, 1994, order of the Wisconsin Supreme Court denying petitioners' motion for reconsideration is reprinted in the Appendix at App. 47. The opinions of the Wisconsin Court of Appeals denying qualified immunity to petitioners have not been reported. The Wisconsin Court of Appeals' March 10, 1993, decision which modifies and affirms the court of appeals' January 12, 1993, opinion, and the January 12, 1993, opinion, are reprinted in the Appendix at App. 47 and 55, respectively. The September 1, 1992, memorandum decision and order of the Dane County Circuit Court denying petitioners' summary judgment motion based on qualified immunity has not been reported. It is reprinted in the Appendix at App. 58.

The January 21, 1991, memorandum decision of the Dane County Circuit Court denying petitioners' motion to dismiss based on qualified immunity has not been reported. It is reprinted in the appendix at App. 84. The February 5, 1991, order of the Wisconsin Court of Appeals denying petitioners leave to appeal from the January 21, 1991, denial of the motion to dismiss has not been reported. It is reprinted in the appendix at App. 83.

JURISDICTION

The judgment and opinion of the Wisconsin Supreme Court was entered on June 24, 1994. A timely motion for reconsideration was denied on September 21, 1994.

The jurisdiction of this Court to review the judgment of the Wisconsin Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment 1, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment 14, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State of Territory or the District of Columbia, subjects, or causes to

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statement of Facts.

The State of Wisconsin Investment Board (Investment Board) is an agency of the State of Wisconsin composed of eight trustees; five of whom are citizen members with significant experience in investments. The agency has fiduciary responsibility to provide professional investment management of funds entrusted to it by state law, including the pension funds of all state employees. Secs. 15.76, 25.15, Wis. Stats.

As executive director, Marshall Burkes (Burkes) was the highest level management employee of the agency, and had responsibility for its day-to-day operations. The trustees met once a month to conduct the business of the investment of the pension funds of thousands of state employees as well as a number of separate segregated state funds. R.22:2-4¶¶6-11. Burkes was the crucial management link between the trustees, who set investment policy, and the heads of the investment divisions in the agency, who analyzed investment proposals and did the technical work to invest the funds for the benefit of the annuitants. Id. In

addition to these critical internal functions, Burkes was the chief spokesperson for the Investment Board in the national financial, business, annuitant, and pension communities. Id. He served at the trustees' pleasure. Sec. 25.156(2), Wis. Stats.

On June 23, 1989, eight trustees of the Investment Board voted unanimously to fire the Investment Board's executive director, Burkes, who served at their pleasure. Burkes was discharged after he visited the State Attorney General and State Auditor on June 19, 1989, regarding the Investment Board's policies for handling disclosure of fees paid by the Investment Board's real estate investment partners to their brokers and agents.

The trustees did not know what Burkes told the two officials at the time they fired Burkes; they knew only what Burkes told them he said when he called several of them shortly after the visits. Burkes testified that he told the trustees only that he was concerned about unspecified influence and finders fees.[1] App. 94–99. At a board meeting two weeks earlier, the trustees had unanimously

---

[1] Although the Wisconsin Supreme Court's majority opinion disclaims reliance on what Burkes actually said, the court discussed in great detail what Burkes actually said and discounted the trustees' lack of knowledge of Burkes' statements to the two officials. App. 19–21. What Burkes actually told the two public officials he visited was quite different than anything he had ever told the trustees. App. 7. Burkes' stated concerns to the two public officials were included in a list of 13 questions which he left with the officials but never shared with the trustees. App. 21–22, n.12. Burkes limited his statements to the trustees to the expression of vague concerns about fee disclosure and influence. The trustees argued that they could reasonably conclude from their knowledge of his statements that he was just rehashing their recent decision not to adopt his recommended fee policy. App. 94–99.

rejected a policy Burkes proposed regarding the Investment Board's role in disclosing and determining the fees paid by the Investment Board's real estate investment partners to their brokers and agents. R.15:5:¶13, Ex. H. Burkes assured the trustees at the time of the fee disclosure meeting that he knew of no illegal or improper activities by anyone. R.14:4:¶6.

During the weekend before Burkes visited the two state officials, the trustees scheduled a meeting for June 20, 1989, to discuss progress on the renegotiation of a problem loan. R.10:5:¶¶16-17; R.11:5:¶17. At the June 20 meeting the Investment Board staff member responsible for the renegotiation reported to the trustees that Burkes was interfering with the trustees' directives regarding the renegotiation. R.18:7-9:¶¶27-33. The staff member presented a chronology to the trustees of Burkes' actions which indicated that Burkes had not been keeping the trustees informed of his actions and had been attempting to block the renegotiation without their knowledge. Id.

The trustees also learned on June 20, 1989 that senior management officials of the Investment Board had gone secretly to one of the trustees, a month and a half before Burkes visited the public officials, to plead with him to do something about Burkes' mismanagement of the Investment Board. R.9:3-5:¶¶8-15. Six of the most senior management staff put their concerns in written statements a month before the visits occurred. Id.[2]

---

[2] Justice Wilcox's concurring opinion, App. 43-44, details the dilemma the trustees were in once they had this information:

> Suppose, for instance, the public employer has an employee who occupies an important, even vital government post. Suppose further that this

During the week prior to Burkes' discharge, two of the trustees conducted independent discussions with staff and confirmed the breakdown between Burkes and the senior staff. R.15:5-7:¶¶16-24. This information was reported to the trustees before they voted to discharge Burkes. R.9:5:¶16.

Even before the dramatic June 20 revelation of the extent of Burkes' mismanagement, the trustees had begun to reevaluate Burkes' performance. R.9 through R.16; R.32. After the trustees gave Burkes an outstanding rating in 1988, Burkes proposed an agricultural investment to the Investment Board that was brought in by his "old friends." R.15:3-4:¶¶8-10. This proposal was brought outside the Investment Board's usual staff analysis, and Burkes brought it back even after it was

---

> employee's performance has been so poor, and his behavior so erratic, that the employer is legitimately concerned that its operations are threatened. In fact, it is so concerned that it is on the verge of discharging the employee. Getting wind of this, the employee rushes to the press or to law enforcement officials or even to the employer itself and makes accusations of corruption which may or may not be accurate. I believe that an employer in that situation should not be so intimidated by the fear of litigation that it fails to do what it reasonably believes is in the public interest. ...
>
> The scenario described above is not so different, in my view, from what happened in this case. I believe the pleadings in this case, even when read in a light most favorable to Burkes, amply establish that his relationship with the trustees was deteriorating long before he raised his vague allegations of "influence peddling" and "employee intimidation" to the attorney general.

rejected by the trustees. Id.; R.12:2-3:¶¶2-6. Burkes also tried to control the flow of information to the trustees by instructing a new trustee not to speak with staff. The trustee offered to resign unless he could speak freely with staff; Burkes backed down. R.12:2:¶¶3. The agency budget was seriously overspent early in 1989, and Burkes' handling of the budget shortfall caused friction between Burkes and the state budgeting agency headed by one of the trustees. R.9:3-5:¶¶8-13. As a result of these problems, two trustees counseled Burkes to be more reasonable. R.14:3-4:¶7; R.32:3-4:¶16.

B. How the Federal Question Was Presented.

Burkes brought suit under 42 U.S.C. § 1983 against five of the eight trustees (now petitioners) who discharged him, alleging that their votes were in unlawful retaliation for his statements to the Attorney General and State Auditor. The petitioners filed a motion to dismiss the First Amendment retaliation claim, asserting qualified immunity. The trial court denied the motion to dismiss because it determined that a First Amendment claim had been stated. App. 85. Interlocutory review of that decision was denied. App. 83-84.

After extensive court-ordered discovery, the trustees moved for summary judgment, again asserting qualified immunity. The motion was denied. App. 58 *et seq.* The trial court found the material facts to be undisputed, and found the law clearly established that Burkes' interests in his speech outweighed the petitioners' interests as public employers. App. 58 *et seq.*

The Wisconsin Court of Appeals accepted interlocutory review and found genuine issues of material fact which precluded summary judgment. App. 55 *et seq.* On reconsideration, the same court held that there were

genuine issues of material fact which precluded summary judgment, and held that the trustees' knowledge of Burkes' inability to manage could not be considered in determining whether they were entitled to immunity. App. 48-49, 51.

The Wisconsin Supreme Court accepted review of the question, determined that the material facts were undisputed, and held that the trustees were not entitled to qualified immunity because the law was clearly established that Burkes' speech interests outweighed the trustees' interests as a public employer. App. 1 *et seq.* Two justices of the seven-member Wisconsin Supreme Court did not participate in the decision. App. 40. Two separate concurring opinions were written by Justices Bablitch and Wilcox. App. 40, 41. Justice Wilcox's concurrence in the result, which was joined by two other justices, stated that he was writing separately to express dissatisfaction with the law of qualified immunity. App. 41. The trustees' motion for reconsideration to the Wisconsin Supreme Court was denied without further opinion. App. 47.

C. The Wisconsin Supreme Court's Analysis of the Public Employer's Duty.

The decision of the Wisconsin Supreme Court poses the question of immunity as: "whether, in June, 1989, the defendants knew or should have known that a decision to discharge the plaintiff for certain communications with the Attorney General and the State Auditor would be unlawful." App. 11. The Wisconsin Supreme Court found the facts on which immunity turned to be undisputed, and held that the defendants should have known that they could not lawfully discharge Burkes after his visits with the two public officials. App. 3-4.

The Wisconsin Supreme Court looked first to whether Burkes' speech was on a matter of public concern, as is required by *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). In this analysis, the Wisconsin Supreme Court concluded the *speech to the public officials*[3] was a matter of public concern. In analyzing the question, the court purported to focus on "the specific facts confronting the defendant" App. 15, 17, but the analysis focused on what Burkes actually said in addition to what the trustees knew. App. 17-22. More importantly, the Wisconsin Supreme Court made inferences from the trustees' knowledge favorable to Burkes to construct what the trustees reasonably could have concluded from their limited knowledge of his speech. App. 19. In making these inferences, the court did not focus on the trustees' knowledge of the speech in question, but imputed knowledge to the trustees they did not have by inferring that Burkes had previously expressed the same concerns to the trustees as he expressed to the two officials. App. 19. The Wisconsin Supreme Court rejected the trustees' argument that *Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988), supported the trustees' reasonable belief that Burkes' speech was too vague to raise a matter of public concern. App. 18. The court also rejected the trustees' argument based on Seventh Circuit precedent that an employee who goes outside his agency to bring public attention to matters of internal agency policy with which he disagrees, is not speaking on a matter of public concern.[4]

---

[3] The focus on what Burkes actually *said*, rather than what the trustees *knew*, pervades the decision. App. 7, 19, 21-22.

[4] *See, e.g., Egger v. Phillips*, 710 F.2d 292, 317-18 (7th Cir.) *(en banc), cert. denied*, 464 U.S. 918 (1983) (In making accusations against co-employees, "Egger was simply doing his job as a criminal investigator," and his speech "must be considered in a different light"); *Zaky v. U.S. Veterans*

By using summary judgment methodology to draw inferences favorable to Burkes, the Wisconsin Supreme Court concluded that the speech was on a matter of public concern. App. 20. The court cited no authority for the proposition that a public employer making a decision to discharge a high level, at-will public employee was required, at the time of the discharge, to draw all inferences favorable to the employee regarding the content of the speech in question.[5]

Administration, 793 F.2d 832, 838-39 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986) ("Dr. Zaky's comments were made as part of an internal process of policy determination, [and therefore] they were not 'a matter of public concern for precisely that reason, even though similar statements in a different context may have appealed to the public's general interest'"), *Hesse v. Bd. of Educ. of Tp. High School Dist. 211*, 848 F.2d 748, 752 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989) ("Hesse was not attempting to speak out as a citizen concerned with the problems facing the school district, but was instead attempting to articulate his own disagreement with policies and procedures which he had either failed to apply or refused to follow", and *Marquez v. Turnock*, 967 F.2d 1175, 1178 (7th Cir. 1992) ("In speaking on this issue [relating to the handling of third-party violations of agency regulations], Marquez did not act simply as a member of the general public; it was his *job* to investigate such violations and make recommendations as to the appropriate response"); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1258 (7th Cir. 1985) (when speaker directly involved in the internal policy being discussed, "additional weight must be given to the supervisor's view that [that] employee has threatened the authority of the employer").

[5] Burkes never told the trustees what he told the two public officials, despite two opportunities to do so: once when he informed them of his visits, and once when he was invited to speak to the trustees before he was discharged. R.25:34-37:¶¶75-76. The court cited a recent case of this Court, *Waters v. Churchill*, ___ U.S. ___ 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994), regarding the duty of a public employer to make inquiry

Once the Wisconsin Supreme Court concluded that the content of Burkes' speech was a matter of public concern, it determined that cases alleging the misuse of public funds, wasteful practices, and mismanagement were "closely analogous" to this case, App. 23–24, and distinguished cases relied on by the employer to establish that the speech was not on a matter of public concern. App. 25–27.

The Wisconsin Supreme Court also drew inferences favorable to Burkes that, in its view, defeated the trustees' reasonable belief that Burkes' visits were motivated by concern over his personal job security. App. 27–28. The court's opinion rejected the employer's inference that Burkes was speaking in order to protect his job, despite Burkes' admission that this was his motivation.[6] App. 27. The court reasoned that it could

---

to determine what Burkes actually said. App. 20–21. While the Wisconsin Supreme Court did not apply the *Waters* holding, it stated: "Nevertheless, had the defendants inquired of the State Auditor or Attorney General or the acting legal counsel who had accompanied the plaintiff (a straightforward and simply process in this case), they would have discovered the type-written list of concerns . . . The list of questions makes clear that the plaintiff was speaking about matters of public concern." App. 21–22. By not applying the *Waters* holding, the Wisconsin Supreme Court acknowledged that the trustees had no duty in 1989 to make such an inquiry.

[6] Burkes' notes from his meetings with the two public officials indicated he was seeking job protection, but the court refused to make inferences favorable to the trustees regarding Burkes' motivation in speaking or consider cases which permitted the trustees to consider motivation as a factor in favor of the lawfulness of the discharge. App. 26–28. *See Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987); *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985), and *Yoggerst v. Stewart*, 623 F.2d 35 (7th Cir. 1980).

not acknowledge that Burkes knew his job was in jeopardy because he was never formally disciplined. App. 26–27. The court rejected the trustees' arguments that no formal warning or progressive discipline was necessary before Burkes was fired, App. 75–80, and that Burkes was seeking job protection, App. 27; R.25:24–25:¶¶54–56, even though these arguments support a reasonable belief that Burkes spoke in order to save his job.

The Wisconsin Supreme Court's opinion then focuses on the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). App. 30–31. This test requires the employer's interest to be considered in light of speech assumed to be on a matter of public concern. The court required the employer to show that *the speech in question* caused actual or potential disruption, and concluded that "[t]he disruptive effect of the plaintiff's speech do not satisfy either standard." App. 31–32.

Most importantly, the Wisconsin Supreme Court refused to consider the information undisputedly possessed by the trustees that Burkes' relationship with them and with the senior management of the agency had completely broken down, because the court thought that while the information was not in dispute, it did not relate directly to the speech in question: "We agree with the plaintiff that under the clearly established law in June, 1989, job performance issues unrelated to the speech were not part of the *Pickering* balance." App. 35. The court did not explain why it rejected the holding of cases such as *Hesse v. Bd. of Educ. of Tp. High School Dist. 211*, 848 F.2d 748, 753 (7th Cir. 1988) which held that the employer was entitled to consider job performance unrelated to the speech in question as part of the *Pickering* balance. The court viewed Burkes' mismanagement to be related solely to whether Burkes would have been discharged anyway; an issue the court

felt could be considered only at a trial on the merits. App. 35.

Justice Wilcox's concurrence in the result expressed misgivings regarding the efficacy of the law of federal qualified immunity to adequately protect public employers who are attempting to act in the best interests of the agencies they operate: "The problem with qualified immunity analysis is that it prevents courts from truly considering all the undisputed facts of the case." App. 42. The concurrence does not question the court's conclusion that job performance information in the hands of the employer must be ignored unless it "relates" to the speech in question, but views this method of analysis to be compelled by this Court's decisions: "*Connick*, *Pickering* and their progeny unduly limit a court's ability to review all undisputed facts when determining whether or not to recognize the defense of qualified immunity," App. 43, and "limit courts to considering solely the employer's speech and the disruptive aspects of that speech." App. 43. In his view, the result is: "[t]he law unrealistically skews this balance, [of the employer's and employee's interest] leaving courts to express fine-sounding platitudes about the need for qualified immunity, but effectively limiting their ability to implement the doctrine." App. 41-42. In his view, public employees may exploit the holding of this case by making vague allegations to insulate themselves from the government's rightful exercise of its duty to ensure effective agency operations. App. 45-46.

REASONS FOR GRANTING THE WRIT

I.

The Wisconsin Supreme Court's Qualified Immunity Standard Deprives Public Employers of the Protection that Qualified Immunity is Designed to Assure, and Will Inhibit Employers from Fearlessly Exercising Reasonable Judgments to Ensure Effective Agency Operations, by Forcing Them to Ignore What They Know About the Employee's Speech and Performance, and Forcing Them to Trial Whenever a Set of Inferences Raises the Possibility that the Employee was Engaging in Protected Speech.

By substituting its view of the facts (including inferences drawn from the facts) for the view reasonably taken by the trustees, the Wisconsin Supreme Court created a qualified immunity standard on summary judgment that deprives public employers of the protection that United States Supreme Court precedent is designed to assure. To comply with the Wisconsin Supreme Court standard, a public employer must not only decide what the facts are before making an employment decision after the employee claims to have spoken, but must consider how those facts could be viewed years later by a court. If there is **any** view of the facts that could arguably support a claim that an employment decision was based on improper retaliation for the employee's speech, the employer will be inhibited from making the employment decision that is in the public's best interest, no matter how reasonable or necessary that decision may be, for fear of the risks and costs of litigation. That result removes the shield of qualified immunity from fearless decisionmaking, and renders illusory the protection afforded by that doctrine. Although *Pierson v. Ray*, 386 U.S. 547, 557 (1967), holds that public officials are "not charged with predicting the future course of constitutional

law," the Wisconsin Supreme Court's qualified immunity standard, in effect, imposes just such a burden on them.

The Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), held that government officials are immune from suits seeking money damages unless clearly established law puts them on notice that their conduct violates a plaintiff's federal right. Qualified immunity is the norm, not the exception. It protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 345 (1986), and should be granted whenever officials of "reasonable competence could disagree" about the lawfulness of their conduct. *Malley*, 475 U.S. at 341. The entitlement of qualified immunity is immunity from suit rather than a defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Thus, immunity is most appropriately addressed and resolved at the summary judgment stage before extensive measures are taken to defend the public official. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 536 (1991).

Qualified immunity shields public decisionmakers from suit for damages if "a reasonable officer could have believed [the challenged action] to be lawful, in light of clearly established law and the information the [officials] possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Even officials who "reasonably but mistakenly conclude" that their actions are lawful are entitled to immunity. *Anderson*, 483 U.S. at 641. The "accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter*, 502 U.S. at ___, 112 S.Ct. at 537, quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

During the last several months of his employment, Marshall Burkes' job performance and his relationship with the Investment Board's professional staff

deteriorated dramatically. Burkes approached two state officials to discuss his purported concerns about the Investment Board's failure to adopt his proposed policy requiring sellers who attempted to interest the Investment Board in investment opportunities to disclose the fees the sellers paid to their brokers and agents. Burkes' own notes from the meetings indicate he was worried about his job security and was seeking job protection. App. 27, R.25:24–25:¶¶54–56. The Investment Board's trustees knew only what Burkes told them about what was said at the meetings, App. 94–99, and that Burkes had previously denied knowledge that anyone was acting illegally or improperly. R.14:4:¶6. Reasonably believing that Burkes had merely taken his dispute about an internal Investment Board policy to outside officials, the trustees focused their attention on Burkes' mismanagement of the agency and discharged him.

The Wisconsin Supreme Court disregarded the requirement of *Anderson*, 483 U.S. at 641, that on summary judgment qualified immunity must be judged on the basis of "the information the ... officers possessed." The trustees argued to the Wisconsin Supreme Court, in effect: "Burkes told us only that he had unspecified 'concerns' about 'influence' and 'fee disclosure,' and had previously assured us that was not accusing anyone of illegal or even improper behavior. We also had current, verified information that Burkes was seriously mismanaging the agency and that his relationship with the senior staff of the agency had broken down. We can rely on that information and existing precedent in concluding we lawfully discharged Burkes." The Wisconsin Supreme Court concluded, in effect, "No. You must assume that when Burkes said he had a concern about 'influence,' he was 'complaining about outsider influences on the trustees' (App. 19), and that you were being "charged with misfeasance" (App. 33), even though you have information that he denied any improper

activity. You must assume that when Burkes said he told the Attorney General and the State Auditor that he was concerned about 'fee disclosure,' he was 'attempting to focus the attention of two agencies upon the Investment Board's use, or possible misuse, of public funds' (App. 19), even though you considered the fee disclosure policy only two weeks earlier, and Burkes disclaimed that public funds were being misused. And you may not take his mismanagement into account at all".

Under the guise of employing summary judgment procedure, App. 12-13, the Wisconsin Supreme Court would require public employers to conduct the First Amendment "public concern" analysis by speculating about what the employee said, and only inferring facts most favorable to the employee's claim of protected speech. The employer must disregard reasonable inferences to the contrary unless he is prepared to take the risk of trial. Instead of exercising judgments based on reasonable beliefs, the Wisconsin Supreme Court apparently expects employers to use an inference-drawing procedure which mirrors the analysis done by courts. Only when an employer could draw no inferences favorable to the employee which would support a claim of protected speech, could an employer proceed without the risk of trial. The immunity, therefore, is lost for the very type of decisionmaking it was designed to protect. The immunity is meaningful only if it protects a decision made through the exercise of judgment; not a decision where opinions could not differ and therefore judgment is not necessary.

The artificial and unworkable character of the Wisconsin Supreme Court's summary judgment standard is even more apparent in the *Pickering* interest balancing it requires public employers to undertake. The trustees had in their possession current, verified, and undisputed information that Burkes, the agency's highest ranking employee and the trustees' link to the operation of the

agency, was interfering with the ability of the professional staff to perform their functions, was undermining the morale of the staff, and was subjecting the agency to risk of financial loss and tort liability. Under the Wisconsin Supreme Court's formulation of the *Pickering* analysis, public employers cannot consider those facts as part of their "interest ... as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. 563, 568 (1968), but could only consider either the actual or potential disruptive effects of the employee's speech itself. App. 31-32. Moreover, the Wisconsin Supreme Court would require public employers to balance the disruptiveness of the employee's speech not against what they actually knew about that speech, but against the hypothetical speech constructed from inferences favorable to the employee. In this case, the Wisconsin Supreme Court required the trustees to balance disruptiveness against Burkes' hypothetical statements "charg[ing them] with misfeasance," and raising "the potential exposure of misuse of public monies and undue influence," App. 33; then faulted them for offering only "bald assertions of the disruptive effect of plaintiff's speech". App. 32. The Wisconsin Supreme Court did not explain how an employer could predict the disruptiveness of an employee's speech when the employer did not know what was said.

The Wisconsin Supreme Court's standard would require public employers to disregard the actual facts in their possession when they make employment decisions, and to instead analyze their acts by reference to hypothetical constructs about how others might view the situation at a later date. The standard is virtually impossible for employers to meet, and reflects the policy concerns expressed by the plurality decision in *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1888, 128 L.Ed.2d 686, 700 (1994):

> The problem with the [Wisconsin Supreme Court's] approach--under which the facts to which the Connick test is applied are determined by the judicial factfinder--is that it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. The government manager would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw.
>
> ....
>
> Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability.

Most courts which have considered qualified immunity in contexts where fact-specific balancing is required, have concluded that immunity is the norm in such cases. At least six circuits, including Seventh Circuit, have concluded that, because of the "fact-intensive balancing test" required by *Pickering*, "it can rarely be considered 'clearly established' for purposes of the *Harlow* qualified immunity standard." *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992) (citing cases); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) ("[Q]ualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required"). The Wisconsin Supreme Court's disregard for the qualified immunity standards articulated by this Court turns the *Connick* test and the *Pickering* balance on summary judgment from a factbound, case-by-case analysis to a bright-line rule: If there is any inference from which a factfinder could conclude that an employee

was speaking on a matter of public concern, the employer can never conclude that the employee's speech was unprotected. Further, the employer's interest in the effective functioning of the agency will never outweigh the employee's interest in speaking unless the employer can demonstrate that there was disruption or potential disruption caused by the speech itself. No amount of bad performance could ever outweigh an employee's alleged exercise of protected speech.

This bright-line rule turns the presumption in favor of immunity into a presumption against immunity. The public employer who acts after a claim of protected speech will be forced to trial and will therefore be restrained in exercising his duty and authority in the public interest. This result is especially startling in this case, because the trustees had a fiduciary duty to act in the interest of the annuitants which is arguably violated by keeping a person in the position of executive director after knowledge of serious mismanagement.

The summary judgment standard adopted by the Wisconsin Supreme Court imposes an impossible burden on the ability of public employers to raise qualified immunity defenses in those cases where protection of public decisionmaking is the most necessary; cases where competing inferences could be drawn from the facts known to the decisionmaker. This is exactly the type of situation that led to the caution in *Pickering* that First Amendment claims must be considered on a case-by-case basis. 391 U.S. at 569. The trustees established that the information available to them supported the reasonable belief that Burkes was speaking on a matter of mere private concern because he was going outside the agency to rehash a policy he had unsuccessfully promoted as part of his employment responsibilities two weeks earlier, citing existing precedent which supported the lawfulness of that belief. *See* cases cited at footnote 4. The Wisconsin Supreme Court rejected the trustees' reliance

on these cases, because they were not factually analogous to Burkes' speech, which the court erroneously characterized from inferences drawn most favorably to Burkes.

Public employers also cannot rely on information of a high-level employee's mismanagement. The Wisconsin Supreme Court concluded *Pickering* constrained it to consider "only the disruptive effects of the speech in question ... in conducting the balancing test," App. 31, and not what reasonable officials in the position of the trustees would likely regard as the most salient piece of information in their possession--that the agency's highest-ranking employee, who served at their pleasure, was seriously mismanaging the agency, but in ways unrelated to his speech activity. App. 34. The Wisconsin Supreme Court held, without citing any authority, that "under the clearly established law in June 1989, job performance issues were not part of the *Pickering* balance," and the trustees' information about Burkes' unsatisfactory job performance could be considered only at trial, as part of the trustees' causation defense under *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977). App. 34.

The Wisconsin Supreme Court inexplicably ignored authority existing in June 1989, and re-affirmed in later cases, which authorizes public employers to consider performance issues unrelated to the employee's speech as a factor in the *Pickering* balance. *See Hesse v. Bd. of Educ. of Tp. High School Dist. 211*, 848 F.2d 748, 753 (7th Cir. 1988) ("In striking a proper [*Pickering*] balance, *it is essential that we note the increasing hostility and deteriorating employment relationship which had been developing between the plaintiff and his supervisors for*

almost five years preceding the alleged adverse job action") (emphasis added).[7]

The summary judgment standard devised by the Wisconsin Supreme Court creates incentives for public employees to create job tenure outside of state law, by "making vague allegations of corruption in order to secure an immunity of their own, an immunity from government's rightful exercise of its duty to ensure effective operations." App. 44 (WILCOX, J., concurring). Under the Wisconsin Supreme Court's standard, every public employee who is discharged after saying "I have a concern about influence peddling" or "I have a concern about the expenditure of public funds" is the victim of retaliation for the exercise of clearly established First Amendment rights, and can force his employer to trial to defend the discharge decision on the merits, no matter how vague the speech or unsatisfactory the employee's performance may have been. This effect is especially pernicious in an agency which has a fiduciary duty to the people it serves, as does the Investment Board.

The Wisconsin Supreme Court's admonition that even serious management breakdowns, if arguably "unrelated" to the speech, cannot be considered a factor in

---

[7] The Wisconsin Supreme Court rejected the trustees' reliance on *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1242 (1992), and *Marquez v. Turnock*, 967 F.2d 1175 (7th Cir. 1992), which confirm *Hesse*'s holding that an employer may take into account the deteriorating nature of the employment relationship, because the cases were decided after June 1989. App. 34. Each of those cases holds that a deteriorating work relationship existing prior to an employee's speech and unrelated to that speech, is a proper factor in the *Pickering* balance. There is no legal authority which prohibits an employer from relying on precedent created after its decision to establish the lawfulness of its decision.

the lawfulness of the discharge, places employers in the dilemma of violating either (1) their duty to the people they serve, or (2) the First Amendment free speech rights of the employee. Unless a public employer is willing to incur the human and financial costs of a jury trial, the immunity standard created by the Wisconsin Supreme Court decision effectively precludes the employer from acting when an employee makes any statement from which a court could later infer matters of public concern, even though a reasonable employer would not have drawn that inference from the statement. It is exactly this dilemma, leading to gridlock in decisionmaking, that the immunity is designed to prevent. *Hunter*, 502 U.S. at ___, 112 S.Ct. at 537.

II.

Certiorari Should be Granted to Give State and Federal Courts Guidance About How Qualified Immunity Defenses are to be Analyzed Where the Court Must Consider the Objectively Reasonable Belief of the Decisionmaker to Decide a Motion for Summary Judgment.

The United States Supreme Court has given only the most general guidance to courts about the proper standard for summary judgment based on grounds of qualified immunity where the claimed constitutional right depends for its existence on a consideration of the objectively reasonable belief of the person whose action is being challenged. The Wisconsin Supreme Court's decision correctly quotes the general principles of immunity, but creates a standard of analysis which so undermines the doctrine's underlying policies that three of the five members deciding the case criticize the United States Supreme Court for creating a hollow defense of "fine-sounding platitudes about the need for qualified immunity," App. 42 (WILCOX, J., concurring). The

analysis employed by the Wisconsin Supreme Court, and the analysis it expects public decisionmakers to employ, virtually guarantee that immunity can never be granted on summary judgment, contrary to federal policy that immunity cases be decided prior to trial. While the Wisconsin Supreme Court expressly stated that it was following federal precedent, it actually departed from the precedent and ignored the conflict between its analysis and the legal standard and policies underlying qualified immunity. The frustration expressed in the concurring opinion strongly suggests that lower courts need more specific guidance if they are to correctly apply qualified immunity.

The petitioners submit that this Court's *per curiam* decision in *Hunter* establishes the proper standard for addressing qualified immunity on summary judgment. *Hunter* requires a reviewing court to analyze the record to determine whether there is **any** reasonable basis to conclude that the defendants acted consistent with the plaintiff's asserted rights, 112 S.Ct. at 536. If the facts support a reasonable belief that the challenged action was lawful, the defendant is immune, even if other facts can be fairly inferred. The Seventh Circuit has followed *Hunter*. *See McDonnell v. Cournia*, 990 F.2d 963, 968 (7th Cir. 1993) ("[I]f a case involves a question of whether probable cause existed to support an officer's actions, the case should not be permitted to go to trial if there is *any* reasonable basis to conclude that probable cause existed") (emphasis in original), quoting *Cross v. City of Des Moines*, 965 F.2d 629, 632 (8th Cir. 1992).

This Court's decisions in *Hunter* and *Anderson* tell lower courts to consider **all** the information possessed by the public officials, but this Court's decisions in *Pickering* and its progeny offer courts only limited guidance in determining the factors which can be taken into account. This Court should tell public employers whether they can rely on the *Hunter* and *Anderson* precedents which permit

a consideration of all information, or whether *Pickering* limits the information which may be considered by public employers.

In addition, although this Court has held that public officials will be put on notice of the unlawfulness of their actions only if existing case law makes such unlawfulness "apparent," *Anderson*, 483 U.S. at 640, the Court has not addressed what "apparent" means in situations where existing caselaw proceeds on a fact-bound, case-by-case analysis of multiple, and sometimes inconsistent factors. For example, this Court's decision in *Mount Healthy*, 429 U.S. at 287, establishes employee performance as an appropriate factor in determining liability in First Amendment cases, but the Court has not addressed whether public officials sued for alleged First Amendment violations can base a claim of qualified immunity on that factor. This Court should confirm that "apparent" means that an employer may consider all factors unless existing caselaw expressly prohibits it from doing so.

Very recently, this Court granted certiorari and summarily vacated an employee speech case from the Second Circuit, remanding the case for further consideration in light of *Waters*. *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir.), *cert. granted, judgment vacated, case remanded sub nom. Harleston v. Jeffries*, ___ U.S. ___, 63 USLW 3385, 1994 WL 388592 (U.S.) (1994). Among other points, the Second Circuit had concluded, as the Wisconsin Supreme Court concluded in this case, that predictions of disruption were insufficient to justify the discharge of an ineffectively performing, high-ranking state employee, and that the defendants were not qualifiedly immune. 21 F.3d at 1243, 1246-47, 1248-49. The *Harleston* case indicates that there is a need for clarification and guidance to lower courts in determining these questions.

This Court's recent decision in *Waters*, ___ U.S. ___, 114 S.Ct. 1878 (1994), strongly implies that the *Connick* and *Pickering* analyses must be performed on what the defendants reasonably believed the plaintiffs' speech to have been, but the Court in that case declined the opportunity to consider the qualified immunity implications of its decision. 114 S.Ct. at 1891. Therefore, *Waters* does not provide the quidance needed on the qualified immunity question, although its reasoning supports the arguments made by the employer in this case.

III.

The Wisconsin Supreme Court's Decision Creates a Precedent Which will Undermine First Amendment Jurisprudence if Unreviewed Because it Creates a Different Standard for Qualified Immunity Analysis in State Courts Considering the Qualified Immunity Defense.

In our federal system, state court decisions have a role in developing substantive federal law, because state courts have concurrent jurisdiction over federal causes of action. *Felder v. Casey*, 487 U.S. 131, 139 (1988). State courts, however, do not have a free hand in shaping the contours of federally protected rights, and may not employ rules of decision which undermine federal rights or create different outcomes if federal claims are brought in the state or federal courts within a state. *Felder*, 487 U.S. at 139–40, 147, 153.

The Wisconsin Supreme Court's decision has destructive effects on future public employers making tough personnel decisions that affect the functioning of public agencies. The decision creates a precedent which will be examined by public employers seeking answers to whether they can lawfully discharge an employee who

claims free speech rights, as well as by state and federal courts looking for guidance about whether the law was clearly established when the employers acted. Under the *Harlow* immunity standard, prudent public employers who wish to avoid damage liability need to look to existing cases to determine whether their contemplated conduct violates clearly established constitutional norms. State and federal courts searching for closely analogous cases under which to analyze qualified immunity "look at whatever decisional law is available." *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) *(en banc), cert. denied*, 488 U.S. 968 (1988). The Wisconsin Supreme Court decision is part of that body of decisional law, and will have to be taken into account by those decisionmakers.

The Wisconsin Supreme Court held that clearly established substantive First Amendment law prohibits public employers from lawfully discharging their highest-level employees if the employees express unspecified concerns to other public officials, even in the face of overwhelming facts which would lead a reasonable employer to discharge the employee.[8] This decision will be considered by many public employers and courts, because its facts place it in the center of the issues involved in First Amendment qualified immunity jurisprudence. Few decisionmakers will be able to argue that this case is not relevant. It will be the rare case where the employee's speech is more vague than Burkes',

---

[8] Although *Rankin v. McPherson*, 483 U.S. 378, 390-91, *reh'g. den.* 483 U.S. 1056 (1987), counsels that high-level employees bear a special burden of caution when they speak, and the public employers have the greatest amount of discretion when they deal with their highest-ranking employees in whom they must have trust and confidence, the Wisconsin Supreme Court's decision gives no consideration to the public employer's need for flexibility when considering a discharge of these key employees.

or more tangentially raises an issue of public concern. It will be the rare case where the public employee's position is more essential to the operation of the agency which employs him. And it will be a rare case in which the employer's knowledge of mismanagement of a public agency is more clearly established.

In nearly every case which will come before the state or federal courts in the future, a plaintiff will be able to show that his speech interests were stronger than Burkes', and that his employer had less of a legitimate interest in his discharge. The Wisconsin Supreme Court's decision will become the clearly established law that will force upon local, state, and federal government employers the Hobson's choice of disregarding their duty to act in the public interest by discharging an unsatisfactory employee, or acting in the public interest by discharging the employee, with the burdens of litigation and a jury trial the certain cost of such action.

The Wisconsin Supreme Court decision also presents the risk that it will be viewed as a "state court" analysis of the federal immunity standard, which will be applied only in state court. Therefore, there is jeopardy of developing a two-track system for determining questions of liability in cases brought under 42 U.S.C. § 1983. To the extent state courts adopt the Wisconsin Supreme Court's analysis, qualified immunity will become virtually unavailable to public officials in First Amendment cases. To the extent that the federal courts continue the generalized view articulated in *Bartlett*, 972 F.2d at 916, and *Benson*, 786 F.2d at 276, *supra*, that immunity is the rule and liability the exception, public officials will recognize benefits if they remove First Amendment employment cases and other cases involving decisions based on the reasonable belief of the public decisionmaker to federal court. Forum shopping will be encouraged, and the principle of "intra-state neutrality" embraced in *Felder*, 487 U.S. at 153, will be undermined.

CONCLUSION

For these various reasons, petitioners respectfully request that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

BRUCE A. OLSEN
Assistant Attorney General
Counsel of Record

ROBERT A. SELK
Acting Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2580

Of Counsel:

WALTRAUD A. ARTS
Quarles & Brady
Post Office Box 2113
Madison, WI 53701
(608) 251-5000

TERRY E. JOHNSON
Peterson, Johnson & Murray
731 N. Van Buren Street
Milwaukee, WI 53702
(414) 271-8800

Attorneys for Petitioners Klauser, Martin, Busby, Lillie and Hurtgen

T. CHRISTOPHER KELLY
145 W. Wilson Street
Madison, Wisconsin 53703
(608) 255-6607
Attorney for Petitioner Edward E. Hales

December 15, 1994

STATE OF WISCONSIN IN SUPREME COURT
Case Nos. 92-2308, 92-2578

MARSHALL BURKES,
Plaintiff-Respondent-Petitioner,
v.
JAMES R. KLAUSER, EUGENE G. MARTIN, MAUREEN J. BUSBY, RICHARD H. LILLIE and NICHOLAS HURTGEN,
Defendants-Petitioners-Respondents-Petitioners,
EDWARD E. HALES,
Defendant-Co-petitioner-Respondent-Petitioner,
M. WILLIAM GERRARD,
Defendant-Third Party Plaintiff,
ACCELERATION NATIONAL INSURANCE COMPANY and RURAL MUTUAL INSURANCE COMPANY,
Third Party Defendants.
[Case No. 92-2308]

MARSHALL BURKES,
Plaintiff-Respondent,
v.
JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE, NICHOLAS HURTGEN,
Defendants-Appellants-Petitioners,
M. WILLIAM GERRARD,
Defendant-Third Party Plaintiff-Respondent,
ACCELERATION NATIONAL INSURANCE COMPANY and RURAL MUTUAL INSURANCE COMPANY,
Third Party Defendants-Respondents.
[Case No. 92-2578]
[Reported at 185 Wis. 2d 309; 517 N.W.2d 503]

June 24, 1994

[*318] SHIRLEY S. ABRAHAMSON, J. This is a review of an unpublished decision of the court of appeals, filed March 10, 1993. The court of appeals modified an order of the circuit court for Dane County, P. Charles Jones, circuit judge, and denied the defendants' motions for summary judgment and for dismissal of the claims against them.

Plaintiff Marshall Burkes, a former executive director of the State of Wisconsin Investment Board, commenced this 42 U.S.C. sec. 1983[1] action against defendants James R. Klauser, Eugene G. Martin, Edward E. Hales, Maureen J. Busby, Richard H. Lillie, and P. Nicholas Hurtgen,[2] members of the board of trustees of the Investment Board,

---

[1] 42 U.S.C. sec. 1983 provides:

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

[2] Defendants James R. Klauser, Eugene G. Martin, Edward E. Hales, Maureen J. Busby, and Richard H. Lillie are members of the eight-person board of trustees that governs the State of Wisconsin Investment Board. James R. Klauser is a member of the Investment Board as a result of his position as the secretary of the Department of Administration. The statute provides that the secretary may appoint a designee to sit as a trustee. Defendant Hurtgen, an employee of the Department of Administration, sometimes sits as trustee as the secretary's designee. Sec. 15.76 (1), Stats. 1991-92.

in their individual and official capacities. The plaintiff claimed that the defendants discharged him because he held meetings with the State Auditor and Attorney General, and that this discharge was in violation of his First Amendment [*319] right to free speech. The circuit court denied the defendants' motion for summary judgment, holding that the defendants failed to make a prima facie showing of qualified immunity from suit.

The court of appeals concluded, as did the circuit court, that the question of qualified immunity is a threshold issue which should be resolved before trial. The court of appeals, however, remanded the cause to the circuit court "to hold an evidentiary hearing . . . to resolve genuine issues of fact as to what the [defendants] knew of Burkes's 'speech' to the state auditor and the attorney general when they discharged him" and to decide the qualified immunity issue as to each defendant. The court of appeals also concluded that the official capacity claim could not be dismissed without reaching the merits of the qualified immunity defense. We granted the defendants' petition for review.

Two issues are raised on review. The first is whether the action should be dismissed because the defendants are entitled to qualified immunity. In this case, the defendants would not be entitled to qualified immunity from suit if in June 1989 the defendants knew or should have known that discharging of the plaintiff from his position as executive director of the Investment Board following his conversations with the State Auditor and the Attorney General would deprive him of clearly established constitutional rights. We conclude that, on the basis of the facts presented up to this point in the proceedings, the defendants are not entitled to qualified immunity. Accordingly we affirm that part of the court of appeals' decision denying the defendants' motion for summary judgment on the grounds of qualified immunity. Unlike the court of appeals, however, we do not remand the cause

to the circuit court for factfinding with respect to the qualified [*320] immunity defense. We remand the matter to the circuit court for further proceedings relating to a trial on the merits.

The second issue is whether the plaintiff may proceed with his claims against the defendants in their official capacities. We hold that he may not; he has failed to show that the defendants were acting pursuant to policy and custom in terminating his employment. Accordingly we reverse that part of the court of appeals' decision denying the defendants' motion for summary judgment on the claim against the defendants in their official capacities. On remand, the circuit court should dismiss these claims.

I.

This case has not been tried. It comes to us on a record of pleadings, depositions and affidavits documenting some of the events that occurred during the plaintiff's employment with the Investment Board. The record is replete with disputed assertions and myriad complex facts. We summarize here only those facts essential to an understanding of the issues; we will furnish additional facts in our discussion of the legal arguments.

The State of Wisconsin Investment Board manages state funds, including over $ 20 billion in public monies, mostly pension and retirement funds for public employees. The Investment Board is governed by eight trustees who oversee the investment of assets and establish policy as to personnel and investments. Secs. 15.76 (1), 25.15 (1), 25.156 (1), Stats. 1991-92. Marshall Burkes, the plaintiff, was hired as executive director of the Investment Board on August 20, 1987. The trustees of the Investment Board terminated his employment on June 23, 1989.

[*321] As executive director of the Investment Board, the plaintiff was responsible for the management and

administration of the investments and for performance of executive and administrative functions according to the policies, principles and directives adopted by the trustees. Sec. 25.156(2), 25.16(2), Stats. 1991-92.

During his tenure as executive director the plaintiff was never formally disciplined, reprimanded or warned in writing of any weaknesses or defects in his job performance. In 1988, at the end of his first year as executive director of the Investment Board, he received a $ 21,000 increase in his $ 90,000 salary, plus a $ 15,000 bonus for his performance in 1987-88. In October 1988, the plaintiff's performance was favorably reviewed in writing and characterized as "outstanding." The chairperson of the Investment Board wrote that the plaintiff had "shown outstanding ability and willingness to tackle tough issues, such as personnel deficiencies...."

The parties dispute whether the plaintiff was ever warned that his job was in jeopardy. Although the plaintiff asserts that he was not, the defendants claim that in late 1988 and early 1989 the plaintiff was informally warned that his job was at risk. The defendants also claim that various trustees spoke privately with the plaintiff, urging him to change the pattern of his behavior. The defendants further assert that, without the plaintiff's knowledge, several members of the staff of the Investment Board had complained to some of the trustees about the plaintiff and that, again without the plaintiff's knowledge, the trustees were compiling information critical of the plaintiff's job performance.

On several occasions in late 1988 and early 1989, the plaintiff proposed a series of agricultural loans to the Investment Board. The undisputed evidence is that [*322] the trustees received this "Agrivest" proposal with reservations and a lack of enthusiasm. The defendants assert that the poor professional judgment shown by this

proposal caused the trustees' confidence in the plaintiff to erode.

In spring of 1989, the plaintiff expressed concern to the Investment Board about a significant loan to The Company Store[3] and a proposed investment in a real estate development in Santa Clarita, California. Both projects had been brought to the Investment Board by William Gerrard, a Wisconsin businessman with interests in real estate brokerage. The trustees initially rejected the Santa Clarita submission at the May 1989 meeting. After a request from William Gerrard, the trustees agreed to hear a second presentation about the development, and at the regular June 1989 meeting the trustees considered and rejected a reformulated version of the proposal.

The plaintiff claims that during this time he voiced concerns to some trustees about Gerrard's apparent influence with trustees. According to the plaintiff's calculations, Gerrard or businesses in which Gerrard held substantial interests would receive finder's fees in excess of $ 300,000 from loan recipients in return for his bringing their investment projects to the Investment Board. The defendants dispute the plaintiff's calculations.

[*323] In June 1989, the plaintiff proposed that the trustees adopt a policy requiring public disclosure of all finder's fees paid by recipients of board loans in the real estate division. This proposal was greeted with disfavor by

---

[3] In 1987 and 1988, the Investment Board invested $ 10 million in The Company Store. In February 1989, The Company Store posted a $6 million loss and faced bankruptcy or buyout. In the first half of 1989 negotiations about the financial situation of The Company Store were in process. According to the affidavits of the defendants, some members of the Investment Board's staff were dissatisfied with the plaintiff's performance in dealing with The Company Store.

the trustees; the motion for disclosure of fees died for lack of a second.

On June 19, 1989, the plaintiff, accompanied by acting legal counsel for the Investment Board, met with State Auditor Dale Cattanach and his deputy, and then with Attorney General Donald Hanaway and Deputy Attorney General Mark Musolf. The State Auditor directs the operations of the Legislative Audit Bureau that conducts postaudits of the accounts of government boards and agencies to assure that all financial transactions have been made in a legal and proper manner. Sec. 13.94, Stats. 1991-92. The Attorney General is head of the Department of Justice which, among other duties, furnishes legal services to the Investment Board. Sec. 165.25(4)(a), Stats. 1991-92.

The plaintiff asserts that at each of these meetings he discussed his concerns about finder's fees, influence peddling (mentioning William Gerrard by name) and staff intimidation. The plaintiff left with each authority a list of concerns which he thought the authorities should address,[4] and a chart detailing finder's fees paid or payable to brokers. The chart (but not the list of concerns) had been prepared for and previously submitted to the trustees.

The plaintiff then attempted to communicate with each of the trustees to discuss these meetings and successfully contacted some of them. According to the plaintiff, he told at least one of the defendants that [*324] these meetings were held because of fee issues and influence peddling.

---

[4] The concerns were about influence peddling and the possible consequences of failure to disclose finder's fees and are set forth at note 10.

The defendants acknowledge that, prior to discharging the plaintiff, they were aware of these meetings and that the plaintiff had expressed concerns at the meetings about "influence" and about finder's fees. However, the defendants deny knowledge of the plaintiff's list of concerns and of his leaving the finder's fee chart with these public officials.

On June 20, 1989, the trustees of the Investment Board met, in a special closed session meeting. The plaintiff was not present; he was at a seminar outside the state. At this Investment Board meeting, the trustees reviewed allegations of the plaintiff's mismanagement, including statements from staff members critical of his performance. According to one staff member, there was also a group discussion of the plaintiff's meetings with the State Auditor and Attorney General.

At the June 20 meeting, the trustees relieved the plaintiff of his responsibilities as executive director. The plaintiff was informed of the action by telephone on June 21, and by telegram on June 22. He was also notified of a special meeting of the trustees to consider his removal as executive director.

At the special meeting, on June 23, the plaintiff was discharged as executive director by unanimous vote of the eight trustees. The affidavit of each trustee asserts that his or her vote to terminate the plaintiff was based on reasons other than the plaintiff's conversations with the State Auditor and Attorney General.

II.

We begin with an overview of three aspects of the law applicable to this section 1983 claim against the [*325] defendants in their individual capacities: (A) the elements of a public official's claim for interference with exercise of free speech, (B) the defense of qualified immunity, and (C)

the rules applicable to review of an order denying summary judgment.

A.

When an employee brings a section 1983 claim against public officials in their individual capacities claiming impermissible discipline for exercising his freedom of speech, the court undertakes a four-step analysis as explicated in *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 417, 479 N.W.2d 917 (1992):

1. The court must first determine whether a public employee's speech touches upon a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).

2. If the court concludes that the employee was speaking on a matter of public concern, the court must then balance the employee's interests in making the statement against the public employer's interest in the effective and efficient fulfillment of its responsibilities to the public. *Pickering v. Board of Education*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968).

3. Assuming that both previous elements are found in favor of the employee, the employee must then prove that the protected speech "was a 'motivating factor'" in that detrimental employment decision. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).

4. If the employee proves the motivating factor, the burden then shifts to the public officials to show by a preponderance of the evidence that they would have reached the same decision in the absence of the protected [*326] speech. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).

The first two steps in the analysis of the employee's claim involve questions of law for the court. If the court determines that the employee has not satisfied the *Connick* and *Pickering* steps, the speech is not protected and the employee's claim is dismissed.

The second two steps involve questions of fact for the factfinder. As a result, this court will address only the first two steps. If the plaintiff's case survives those analyses, the second two steps will be determined at trial.

B.

An analysis of qualified immunity presumes that the employee has made a sufficient showing to satisfy the *Connick* and *Pickering* steps. When government officials abuse their office, an action for damages against the officials in their individual capacities may be the only realistic means for vindicating a constitutional right. On the other hand, permitting lawsuits against government officials in their individual capacities may unduly hamper officials in the discharge of their duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 814, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). The cases have accommodated these competing concerns by providing officials sued in their individual capacities with qualified immunity.

The difficulty, however, is in determining when a particular action is entitled to qualified immunity and when one is not. Government officials are not protected from suit for civil damages (that is, they do not have the defense of qualified immunity) when at the time they acted they knew or should have known that the action would deprive the employee of a constitutional right. [*327] The relevant inquiry, then, is whether a reasonable state official could have believed his or her act was constitutional "in light of clearly established law and the information [he or she] possessed" at the time of the

official's action. *Anderson v. Creighton*, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).[5]

The standard of objective legal reasonableness used in determining qualified immunity requires the court to focus on the degree to which clearly established case law gives guidance to officials faced with a particular fact situation. *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 407-08, 479 N.W.2d 917 (1992). In determining whether it is objectively legally reasonable for public officials to conclude that a particular decision was lawful, we must examine the information they possessed in light of the established case law at the time. In this case, the question is whether, in June 1989, the defendants knew or should have known that a decision to discharge the plaintiff for certain communications with the Attorney General and the State Auditor would be unlawful. *Anderson v. Creighton*, 483 U.S. 635, 639-640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).

Qualified immunity is an affirmative defense. If the public officials are immune from suit, there is no determination of liability on the merits. Qualified immunity forestalls the lawsuit from proceeding. It is a [*328] question of law for the court. *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 406, 479 N.W.2d 917 (1992). Thus it is appropriately addressed and resolved at the summary judgment stage before extensive measures are taken to defend the public officials. *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 415, 479 N.W.2d 917 (1992)

---

[5] "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), quoted with approval, *Wyatt v. Cole*, 118 L. Ed. 2d 504, U.S. , 112 S. Ct. 1827, 1832 (1992).

(quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985).

C.

This case comes before us as a review of a denial of summary judgement on the plaintiff's claim against the defendants in their individual capacities. We review de novo the grant or denial of a summary judgement motion. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-317, 401 N.W.2d 816 (1987). Summary judgment is governed by sec. 802.08, Stats. 1991-92, and the general procedure for review has been explained by the courts in numerous cases. See, e.g., *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). The application of this methodology to defendants' claims of qualified immunity in a section 1983 action is not as well chronicled by the Wisconsin courts.

When a court decides a motion for summary judgment based on the defense of qualified immunity, it must determine from the complaint whether the plaintiff has alleged facts establishing a claim for a violation of a clearly established constitutional right. *Baxter v. DNR*, 165 Wis. 2d 298, 303, 477 N.W.2d 648 (Ct. App. 1991); *Rakovich v. Wade*, 850 F.2d 1179, 1210, n.22 (7th Cir. 1988) (en banc), cert. denied, 488 U.S. 968, 102 L. Ed. 2d 534, 109 S. Ct. 497 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). Second, the court must determine whether the defendants are entitled to the defense of qualified immunity from suit.

In a summary judgment proceeding, the court reviews the undisputed facts in the light most favorable to the party opposing summary judgment (here the plaintiff) and draws reasonable inferences in that party's favor. *Green v. Carlson*, 826 F.2d 647, 650 (7th Cir. 1987). If such a

reading shows as a matter of law that the defendant's conduct violated no clearly established legal norms, then the summary judgment should be granted. However, if there are issues of disputed fact upon which immunity turns, or if it is clear that the defendants' conduct did violate clearly established norms, the case should proceed to trial. *Baxter v. DNR*, 165 Wis. 2d 298, 303-04, 477 N.W.2d 648 (Ct. App. 1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 805, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985); *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987).

As noted above, qualified immunity is immunity from suit; the primary benefit of such immunity is to shield public officials from protracted and potentially wasteful litigation. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). This principal benefit, then, is lost if the case proceeds to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). Nevertheless the denial of summary judgment does not preclude a party from raising at trial issues considered in the summary judgment proceeding. *Anderson v. Creighton*, 483 U.S. 635, 641, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *Green v. Carlson*, 826 F.2d 647, 652, n.4 (7th Cir. 1987).

The court of appeals determined that there were genuine issues of material fact relating to the defendants' knowledge of the content of the plaintiff's speech [*330] when they discharged him. Concluding that additional factfinding should precede a ruling on qualified immunity, the court of appeals remanded the case to the circuit court for that purpose. The court of appeals erred. Remanding the case for such factfinding before trial contravenes the practice adopted by other courts in this type of case. To follow the court of appeals' approach would invite repeated trial court proceedings and appeals. If issues of fact preclude granting the shelter of qualified immunity,

the case should proceed to trial on the merits. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985).

On review the defendants assert that their immunity does not turn on any disputed facts. The plaintiff appears to assert on the one hand that the evidence of his speech and the defendants' knowledge of his speech "is sufficient to establish First Amendment protection pursuant to clearly established law," Plaintiff's Brief, p. 22, and on the other hand that "disputed material factual issues" about the defendants' knowledge "require resolution by a full trial on the merits." Plaintiff's Brief p. 22. We shall explore the question of the defendants' knowledge in our discussion of the applicable law.

III.

As we explained above, in a section 1983 action such as the one in this case, a court must determine first whether a public employee's speech touches upon a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). Second, the court must determine whether the employee's interest in making the statement outweighs the public employer's interest in the effective and efficient fulfillment of its responsibilities [*331] to the public. *Pickering v. Board of Education*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968).

Before a court considers a claim of qualified immunity the plaintiff must have made a sufficient showing satisfying these two steps. For the plaintiff in this case to defeat the defense of qualified immunity at this stage, the court must conclude that the defendants reasonably believed on the basis of clearly established law at the time (a) that the plaintiff's speech to the State Auditor and the Attorney General was on a matter of public concern and therefore was protected by the First Amendment (the

Connick test), and (b) that the plaintiff's speech was not overridden by the Investment Board's interest in the effective and efficient fulfillment of its responsibilities to the public (the *Pickering* test). *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968); *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 410, 479 N.W.2d 917 (1992).

To determine whether the law was clearly established at the time of the defendants' alleged violation, a court cannot look at the law in the abstract. Rather, the test for qualified immunity is whether the law was clear in relation to the specific facts confronting the defendants at the time of their action. *Anderson v. Creighton*, 483 U.S. 635, 639-40, n.2, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *Green v. Carlson*, 826 F.2d 647, 649 (7th Cir. 1987). The plaintiff's claimed right must be sufficiently particularized to put the defendants on notice of analogous case law indicating that their conduct is unlawful; it cannot be characterized in such general terms that all cases are applicable or in such great detail that each case is [*332] unique. *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).[6]

The inquiry is necessarily fact-specific and focuses on the circumstances with which the official is confronted.

---

[6] The United States Supreme Court has provided courts with guidance in making the determination whether the law was clearly established: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) (citations omitted).

Cases involving the exact fact pattern of the case at bar are not necessary; case law in closely analogous areas permits a court to determine whether the constitutional right was clearly established at the time of the alleged violation. *Anderson v. Creighton*, 483 U.S. 635, 639, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *Conner v. Reinhard*, 847 F.2d 384, 388 (7th Cir.), cert. denied 488 U.S. 856, 102 L. Ed. 2d 118, 109 S. Ct. 147 (1988); *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 409, 479 N.W.2d 917 (1992).[7]

We turn first to the *Connick* public concern test and then to the *Pickering* balancing test. With respect to each test we set forth additional facts as necessary to formulate the plaintiff's claimed right, and we examine [*333] the applicable law to determine whether it was clearly established that the defendants' conduct violated a constitutional or statutory right.

A.

The first step in our "*Connick* test" analysis is to determine whether the undisputed facts show that the plaintiff's speech was a matter of public concern, a matter in which "debate is vital to informed decisionmaking by the electorate." *Pickering v. Board of Education*, 391 U.S. 563, 571-72, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). The second step is to determine whether the defendants knew or had reason to know that the plaintiff's speech was a

---

[7] "The plaintiff bears the burden of establishing the existence of the allegedly 'clearly established' constitutional right." *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 409, 479 N.W.2d 917 (1992) (citations omitted). The defendants, as the movants for summary judgment, bear the burden of proving that the facts relevant to the determination of qualified immunity are not disputed. *Green v. Carlson*, 826 F.2d 647, 651 (7th Cir. 1987).

matter of public concern. *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).

Neither every matter that transpires within a government office, nor every criticism directed at public officials is a matter of public concern. To determine whether a plaintiff's speech is of "public concern" we must examine its content, context, and form. *Connick v. Myers*, 461 U.S. 138, 147-148, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).

We note that the motivation behind an employee's speech is relevant in determining whether matters of public concern are implicated by the speech. However, motive alone is not dispositive. Even though an employee's private concerns may be implicated, a fragment of the speech touching upon a public concern may satisfy this part of the test. *Berg v. Hunter*, 854 F.2d 238, 242-43 (7th Cir. 1988), cert. denied 489 U.S. 1053, 103 L. Ed. 2d 583, 109 S. Ct. 1314 (1989); *O'Brien v. Town of Caledonia*, 748 F.2d 403, 407-08 (7th Cir. 1984).

In analyzing the content of the plaintiff's speech in this case, we must first examine the extent of the [*334] defendants' knowledge of the plaintiff's speech. We turn initially, as the defendants request, to what the defendants knew about the plaintiff's discussion with the State Auditor and the Attorney General when they discharged him.

The defendants concede that they knew that the plaintiff met with the Auditor and Attorney General and expressed to these officials his concern regarding public disclosure of finder's fees and outside influences on the trustees. The defendants assert that they did not know that the plaintiff left with the officials a list of concerns or a chart about finder's fees. However, the defendants knew the contents of one of the materials, the chart, because the plaintiff had distributed it at a trustees' meeting.

The defendants contend that their limited knowledge of the content of the plaintiff's speech was too vague[8] to serve as a sufficient basis upon which to conclude that they could have reasonably known that the content of the plaintiff's speech was a matter of public concern. The defendants assert that it would have been reasonable for them to conclude that the plaintiff was seeking support outside the agency for his failed policy on disclosure of finder's fees. According to the defendants, the policy of disclosure is an internal [*335] policy of the Investment Board, and thus no more than a matter of private concern to the plaintiff.

The defendants' characterization of the record ignores several salient events, all of which occurred before the plaintiff's meetings with the State Auditor and the Attorney General: (1) Gerrard did receive finder's fees and the plaintiff presented a chart showing fees to the trustees. (2) The plaintiff had presented the fee disclosure issue to the trustees at one of their regular meetings. (3) The plaintiff had raised concerns about fee disclosure and about Gerrard's apparent influence with trustees in conversations with individual trustees. (4) In conversations with one or more two trustees, the plaintiff had warned that he might have to consult with the Attorney General. (5) The trustees had taken no action on the plaintiff's concerns.

---

[8] The defendants refer to *Vukadinovich v. Bartels*, 853 F.2d 1387, 1391 (7th Cir. 1988), for the rule that the First Amendment does not protect a person whose speech is too vague to be construed as raising an issue of public concern. Vukadinovich had resigned as basketball coach and his contract as a teacher was then canceled. He asserted that his statement to the media that "If any body has anything to hide, fine," caused the cancellation of his contract. The court held that the language was too vague to raise an issue of public concern.

When this record is viewed in the light most favorable to the plaintiff, the party opposing the summary judgment motion, the only reasonable conclusion is that the defendants knew of the plaintiff's concern about finder's fees and outsider influences on the trustees specifically. On this record, the plaintiff's speech may generally be characterized as attempting to focus the attention of two agencies upon the Investment Board's use, or possible misuse, of public funds. We conclude that reasonable trustees would have perceived the speech in this way.[9]

[*336] The defendants dispute this conclusion by relying on the plaintiff's statement to trustees that in the meetings with the Auditor and Attorney General he did not accuse the defendants of any illegality or impropriety. This argument is not persuasive. An accusation of illegality is not required to render statements of apprehension about the use of public monies a matter of

---

[9] The Deputy Attorney General interpreted the plaintiff's limited conversation with him in this manner.

In his deposition, Deputy Attorney General Mark Musolf characterized the plaintiff's communication as follows:

Q: Well, did he indicate that the Investment Board, I'm talking about Mr. Burkes, indicate that the Investment Board decision making was somehow being affected or influenced, a concern with that?

A: Yes, yes he did. . . .

Q: Is there anything else you can recall about it, Mr. Burkes' concerns?

A: Well, he was quite concerned. I do recall that. He was obviously quite sincere about it when he came there... . . .

A: . . . if his allegations were proven true, were they serious? Yes.

Musolf deposition at pp. 29–31.

public concern; an allegation of waste can rise to that level. *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983); *Czurlanis v. Albanese*, 721 F.2d 98, 104 (3d Cir. 1983). Moreover, even if the plaintiff's suspicions were subsequently demonstrated to be incorrect, absent proof of false statements knowingly or recklessly made the plaintiff's speech in a matter of public concern is entitled to First Amendment protection. *O'Brien v. Town of Caledonia*, 748 F.2d 403, 407, n.2 (7th Cir. 1984) (citing *Pickering v. Board of Education*, 391 U.S. 563, 574, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1967)).

As we explained, we have examined the plaintiff's statements not in terms of what the plaintiff actually said to the State Auditor and the Attorney General, but in terms of what the defendants concede they knew about the plaintiff's speech and the reasonable inferences to be drawn from the undisputed facts in the record known to the defendants at that time. A recent plurality opinion of the United States Supreme Court [*337] involved a discharge of an employee when the employee and the government presented conflicting versions of what the employee actually said. The Court held that a court applying the *Connick* test must consider not only "the facts as the employer thought them to be," but also "the reasonableness of the employer's conclusions." *Waters v. Chambers* [sic], U.S. , , 1994 WL 223511 at p. 10 (U.S.) (May 31, 1994). The plurality opinion apparently requires a government employer, at least in certain circumstances, to make a reasonable investigation to determine what the plaintiff actually said. *Waters v. Chambers*, U.S. , 1994 WL 223511 (U.S.) (1994).[10]

If we were to apply the Waters plurality opinion to this case, we might conclude that the defendants should have

---

[10] The parties submitted letter briefs on this case upon the court's request.

made an inquiry to determine what the plaintiff had actually said. For purposes of deciding this case on the motion for summary judgment, we need not require such an inquiry. We can render a decision on the basis of the defendants' understanding of what was actually said. Nevertheless, had the defendants inquired of the State Auditor or Attorney General or the acting legal counsel who had accompanied the plaintiff (a straightforward and simple process in this case),[11] they would have discovered the typewritten list of concerns delivered by the plaintiff to the State Auditor and Attorney General (set forth in the [*338] margin)[12] and the chart of finder's

---

[11] The defendants assert that they gave the plaintiff the opportunity to describe his conversations, but his responses were vague.

[12] "1. Is brokerage fee splitting appropriate where two of the three realty firms produce or furnish the prospective investor with no written material or representation?

2. How can the quality of representation be determined if a broker provides the prospective investor with no written material or representation?

3. How can the amounts of brokerage fees which are being split be evaluated by the prospective investor for each broker if no written material or representation has been provided by one of the brokers?

4. If no written material or representations are provided to the prospective investor, what is the Investment Board's justification for funding the split payment to that broker?

5. What recourse does the Investment Board and/or Seller have to a broker who may not have a written contract with the seller, and does not provide any written representation?

6. Should the Investment Board provide investment funds to cover a brokerage fee when one of the brokers reportedly told the Chairman that his fee is earned by taking the staff to lunch and knowing how to get things past the Trustees?

fees which the defendants already possessed. The list of questions [*339] makes clear that the plaintiff was speaking about matters of public concern.

---

7. How was the real estate division influenced not to use one of the three contracted fiduciary advisors, or an independent third party advisor, to cross-check the three approved Lincoln deals this year?

8. What is the explanation that the last three Board approved projects (of the year's total of four) came from Lincoln's brokers?

9. Is it proper for a lobbyist to have a voice, or influence in Investment Board policy and personnel, while hired as "money finder" for a real estate developer (and private placement borrowers in Wisconsin) who became our investment partner in 1986?

10. What recourse does the Investment Board have to the loan finder and/or lobbyist of the Company Store in LaCrosse for the accelerating deterioration of the Company immediately after the loan was made in 1988?

11. What code of conduct in Wisconsin will restrain a broker/lobbyist from demeaning the judgment of certain Investment Directors (who might oppose his influence) to their seniors?

12. How can management and staff be protected from the adversities of "influence peddling and/or intimidation" by broker/lobbyist who mentions close ties with certain Trustees and high officials?

13. Was it appropriate professional conduct for a Trustee to threaten the Executive Director's future with the Investment Board if he continues to recommend full disclosure of finder's fees to the Board?

Your approval or clearance on both the appropriateness of the funding and the amount of the funding for each of the three brokers in each of the three deals this year is requested. Any reduction in funding for brokerage represents a direct cash savings to the Investment Board. Funding of deal number two is scheduled for mid-July and regular due diligence is underway."

Our analysis of the content of the speech requires us to examine next the case law in existence in June 1989 that might cover this fact situation. This court has observed that the "plaintiff bears the burden of establishing the existence of the 'clearly established' constitutional right" by citing cases that are "closely analogous" or "would give a reasonable public official . . . notice that their actions violated a constitutional right." *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 409, 479 N.W.2d 917 (1992). As we have said, the cases need not involve the exact fact pattern of the case at bar, but "case law in a closely analogous area is essential to permit us to conclude that the constitutional right was clearly established at the time of the alleged violation." *Conner v. Reinhard*, 847 F.2d 384, 388 (7th Cir. 1988) (citations omitted).

Accordingly, the plaintiff calls our attention to a number of cases demonstrating that his claimed First Amendment right to express concern about misuse of public funds is well-recognized and sufficiently particular. We agree with the plaintiff's position. Several [*340] courts have identified the misuse of public funds, wastefulness, and inefficiency in managing and operating government entities as matters of public concern. See, e.g., *Berg v. Hunter*, 854 F.2d 238, 242 (7th Cir. 1988), cert. denied 489 U.S. 1053, 103 L. Ed. 2d 583, 109 S. Ct. 1314 (1989) (a public school teacher's comments about misrepresentations of salaries and unwarranted salary increases were matters of public concern);[13] *Conner v. Reinhard*, 847 F.2d 384, 389 (7th Cir. 1988) (parties concede that public employees' speech about the proper use of public funds is a matter of public concern); *Rookard*

---

[13] "In an age of ever dwindling public resources, mounting deficits, and demand for greater accountability by public officials, charges of inequitable allocation or misuse of public funds implicates matters of substantial public concern." *Berg v. Hunter*, 854 F.2d 238, 243 (7th Cir. 1988).

v. Health and Hospitals Corporation, 710 F.2d 41 (2d Cir. 1983) (employee's speech about wasteful practices and possible hospital mismanagement was a matter of public concern); *Hamer v. Brown*, 831 F.2d 1398 (8th Cir. 1987) (employee's speech to a committee authorized to investigate a university concerning the expenditure of public funds by the university was a matter of public concern); *Ohse v. Hughes*, 816 F.2d 1144, 1149-52 (7th Cir. 1987), vacated on other grounds, 485 U.S. 902 (1988), remanded, 863 F.2d 22 (7th Cir. 1988) (public employee's letter to public officials calling for investigation and filing of criminal charges for abuse of sick leave, improper use of mileage reimbursement forms, and misappropriation of money budgeted for office expenses was a matter of public concern); *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986) (employee's speech about medicaid fraud in the Mental Retardation Board involves public interest "near its zenith").

[*341] Thus the speech at issue in this case satisfies the content prong of the *Connick* test.

The defendants contend, and rightly so, that not all speech concerning public monies automatically deserves protection. The Supreme Court distinguishes between speech that "seek[s] to bring to light actual or potential wrongdoing or breach of public trust," thus warranting protection, and speech that merely reflects an employee's dissatisfaction with the employment situation. *Connick v. Myers*, 461 U.S. 138, 148, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). We must therefore examine the context of the speech, particularly the reason for the speech. Was the speech intended to bring wrongdoing to light, to raise issues of public concern because they are of public concern, or to further some purely private interest? *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1405-06 (9th Cir. 1988). A public employee may not transform a personal grievance into a matter of public concern by invoking a supposed public interest in the way a governmental

agency is run. *Ferrara v. Mills*, 781 F.2d 1508, 1515-16 (11th Cir. 1986).

The defendants argue that the plaintiff spoke in the context either of saving his job or of garnering extra-agency support for his proposed policy of fee disclosure. Viewing the speech in this context, they argue, demonstrates that it is not a matter of public concern.

To support their position that the plaintiff's speech was not a matter of public concern, the defendants assert that they could have reasonably relied on *Zaky v. U.S. Veterans Administration*, 793 F.2d 832 (7th Cir.), cert. denied 479 U.S. 987 (1986). In *Zaky* a Veterans' Administration doctor voiced his concerns about patient care to hospital personnel only after formal charges had been filed against him for abandoning a [*342] seriously ill patient. Subsequently, the doctor, who was in his probationary employment period, had a documented history of difficult personal relations with the staff. Additional charges were filed, there was dissatisfaction with his job performance, and his employment was finally terminated. These circumstances, very different from the circumstances in this case, warranted a conclusion that taken in context the doctor's speech was of private, not public concern.

The defendants also rely on *Hesse v. Board of Education*, 848 F.2d 748 (7th Cir. 1988), cert. denied 489 U.S. 1015, 103 L. Ed. 2d 190, 109 S. Ct. 1128 (1989), another case which is easily distinguished from the case at bar. In *Hesse*, over a five-year period a public school teacher sent a series of memoranda to the school administration defending his teaching methods. Included in the series was a memorandum criticizing the school system's grading policy. This memorandum arguably raised a matter of public concern. However, the *Hesse* case can be interpreted as holding that the point of this memorandum, when analyzed in the context of the

teacher's longstanding personal dispute with the administration, did not rise to the level of public concern. *Hesse* at 848 F.2d at 752. Rather, the memorandum aired the teacher's personal grievances and challenged the administration's criticisms of his teaching methods.

While we agree with the defendants that the *Zaky* and *Hesse* cases allow a court to examine the motive underlying an employee's speech, we conclude that the facts of *Zaky* and *Hesse* are not analogous to those of the case at bar and that the defendants could not have reasonably relied on these cases.

Unlike in *Zaky*, the plaintiff in the case at bar voiced his concerns before he knew of any formal charges against him. Unlike in *Hesse*, the plaintiff in [*343] the case at bar had no personal interest in the finder's fees or their disclosure; his speech was not directed to matters of a personal interest related to his job.

Although the defendants assert that individual trustees had told the plaintiff of dissatisfaction with some aspects of his job performance, there is no evidence that the plaintiff was told or had reason to believe that he was in danger of discharge. There is nothing in the record to indicate that the trustees reprimanded or disciplined the plaintiff in any way. The defendants assert that, evidence of the plaintiff's poor job performance was growing during the several days or weeks before he was discharged. Specifically, the defendants claim evidence that the plaintiff was mismanaging the agency, alienating key employees, interfering with and obstructing crucial decisions of the professional staff, and threatening the financial integrity of the loan to The Company Store by undermining the workout of the loan.

Although some of the trustees talked to the plaintiff about their concerns about some of these matters, much of the information that some trustees were gathering

about the plaintiff was deliberately withheld from the plaintiff. In any event, it is undisputed that the trustees never officially or formally advised the plaintiff that his job was in jeopardy before he was discharged. This factor distinguishes this case from other cases upon which the defendants rely.

Drawing inferences most favorable to the party opposing summary judgment (here the plaintiff), we must conclude that any knowledge the plaintiff may have had of criticisms of his job performance cannot be equated with a belief that his job was in imminent jeopardy. The undisputed evidence is that about eight months before the trustees discharged the plaintiff [*344] they favorably reviewed his job performance and gave him a substantial salary increase.

When the plaintiff met with the Attorney General and State Auditor, he brought the following notes: "I've come to you as our professional resource and apparently as protection. After 18 years in Washington, D.C. I know influence peddling, but this intimidation is direct. No job security." Again, from these undisputed facts we must draw those inferences most favorable to the party opposing summary judgment (here the plaintiff). Accordingly we infer that the plaintiff was concerned that his consulting with the Attorney General and State Auditor might put his job in jeopardy. We cannot draw the inference unfavorable to the plaintiff that his only or principal concern was that his job was in jeopardy for reasons relating to his mismanagement.

In any event, whether the plaintiff considered his job to be in jeopardy when he spoke with the trustees, the State Auditor or the Attorney General remains in dispute.

Furthermore, even if the plaintiff believed his job was at risk and his personal motivation was to protect his job, such a motivation does not necessarily negate or overcome

the essentially public nature of the speech. Even if an employee is involved in an ongoing dispute with an employer and has concerns about the job, a court may conclude that as a matter of law the employee's speech relates to a matter of public concern. See, e.g., *Connick v. Myers*, 461 U.S. 138, 149, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983) (one part of employee's speech related to matter of public concern even though employee engaged in ongoing dispute with supervisor); *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984) (police officer's concerns that criminal citations were not issued for [*345] political reasons were of great public interest despite the officer's co-existing private concern about job retention); *Rode v. Dellarciprete*, 845 F.2d 1195, 1201 (3d Cir. 1988) (employee's speech on matter of public concern protected by first amendment even though speech arose out of employee's personal employment problem; complete reliance on the employee's motivation for speaking is inappropriate).

We conclude that, viewed in light of the existing case law, the plaintiff's speech about possible influence peddling and the potential unwise use or misuse of hundreds of thousands of public dollars meets the public concern test with respect to context and falls well within a right supported by clearly established law, even if the plaintiff was concerned about job retention.

We now proceed to the final step in the *Connick* analysis and determine whether the form of the plaintiff's speech demonstrates that he spoke on a matter of public concern. In analyzing the form of the plaintiff's speech, we must consider the time, place and manner of the speech. *Connick v. Myers*, 461 U.S. 138, 152, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). While form and context may overlap, the case law suggests that "form" refers to the tone of the speech and the forum in which it is made, while "context" refers to the circumstance in which the

speech arises. *Wulf v. City of Wichita*, 883 F.2d 842, 860, n.26 (10th Cir. 1989).

There can be little doubt that the form of the plaintiff's speech satisfies the third prong of the *Connick* test and thus warrants protection. The United States Supreme Court has held that a public employee's concerns expressed privately to public officials warrant protection under the First Amendment. *Givhan v. [*346] Western Line Consolidated School District*, 439 U.S. 410, 415–416, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979). Moreover, the Seventh, Second, and Sixth Circuits Courts of Appeal have held that when a public employee speaks to investigating authorities on subjects relating to their duties, the speech is protected. *O'Brien v. Town of New Caledonia*, 748 F.2d 403 (7th Cir. 1984) (police officer's speech to District Attorney, judge, and Federal Bureau of Investigation about possible misconduct by police chief protected); *Rookard v. Health and Hospitals Corporation*, 710 F.2d 41 (2d Cir. 1983) (nurse's speech to investigatory agency about wasteful practices and possible hospital mismanagement protected); *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986) (employee's speech to state Attorney General investigating unlawful medicaid billing practices protected).

After considering the totality of the circumstances and applying the teachings of *Connick v. Myers* and its progeny, we conclude that the information the plaintiff conveyed to the Auditor and the Attorney General was of public, not merely personal or private, concern. Furthermore, we conclude that at the time the defendants discharged the plaintiff the defendants knew or should have known, on the basis of clearly established law, that the plaintiff's speech was about a matter of public concern.

B.

A showing that the plaintiff's speech touches on a matter of public concern does not automatically merit constitutional protection; it does not, by itself, defeat the defense of qualified immunity. Rather, such speech is protected only if a court concludes as a matter of law [*347] that the employee's First Amendment right to comment on matters of public concern outweighs the governmental interest in the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). "*Pickering* asks whether the state's allegedly retaliatory action is justified in light of the competing interests of the employee as a citizen and the state as employer." *Berg v. Hunter*, 854 F.2d 238, 243 (7th Cir. 1988).

In a summary judgement motion on qualified immunity, it is assumed that the public employer's retaliatory action was based on the employee's speech. *Rakovich v. Wade*, 850 F.2d 1180, 1210 (7th Cir. 1987) (en banc), cert. denied, 488 U.S. 968, 102 L. Ed. 2d 534, 109 S. Ct. 497 (1988). Nevertheless, if a public employer's ability to perform and carry out its public function is sufficiently disrupted by the speech in question, the speech does not merit constitutional protection. Among the factors to weigh in the *Pickering* analysis are the manner, time, and place of the employee's expression, the context in which the dispute arose, *Rankin v. McPherson*, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987), and the state interest in the effective functioning of the public employer's enterprise. *Rankin v. McPherson*, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987). Considerations relating to effective functioning include matters such as whether the employee's speech breached confidentiality, impeded the employee's ability to perform his or her responsibilities, impeded the employee's close and personal employment relationship with superiors and

coworkers, interfered with discipline among co-workers, or otherwise interfered with the regular operations of the enterprise. *Rankin v. McPherson*, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987); *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 411, 479 N.W.2d 917 (1992); *Frazier v. King*, 873 F.2d 820, 825 [*348] (5th Cir.), cert. denied, *Davoli v. Frazier*, 493 U.S. 977, 107 L. Ed. 2d 504, 110 S. Ct. 502 (1989); *Ohse v. Hughes*, 816 F.2d 1144, 1151 (7th Cir. 1987); *Rookard v. Health & Hospitals Corp.*, 710 F.2d 41, 46 (2d Cir. 1983).

Because a wide variety of fact situations may give rise to an employee's speech on matters of public concern, the United States Supreme Court has not set forth a rigid or general standard against which an employee's statements may be judged. *Pickering v. Board of Education*, 391 U.S. 563, 569, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). However, *Pickering* does require that to defeat the employee's speech interest, the statement must cause an actual and material disruption. *Pickering*, 391 U.S. at 572; *Rankin v. McPherson*, 483 U.S. 378, 388-389, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987); *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 420, 479 N.W.2d 917 (1992).

Additionally *Pickering* and its progeny make clear that only the disruptive effects of the speech in question can be considered in conducting the balancing test. In *Pickering* a public school teacher wrote a letter to the editor of a local paper criticizing the school board's management and expenditure of funds. The Court's analysis of the disruption caused by the teachers actions was limited to the disruptiveness of the letter itself. *Pickering*, 391 U.S. at 567-568. See also *Rankin v. McPherson*, 483 U.S. 378, 388-89, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987) (employee's speech not disruptive because "there [was] no evidence that it interfered with the efficient functioning of the office. . . . Nor was there any danger that McPherson had discredited the office by making her statement in public"); *Conner v. Reinhard*, 847 F.2d 384,

388 (7th Cir. 1988) (public official may retaliate against employee for speech only if statements "so disruptive that they substantially impeded the performance of her duties or interfered with the functioning of the office"); [*349] *Roth v. Veteran's Administration*, 856 F.2d 1401, 1407-08 (1988) ("whistleblowing" by its nature engenders some hostility; dispute about the extent of office disruption requires a trial). In *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 420, 417, 479 N.W.2d 917 (1992), the court said that "The public employer must show actual, material and substantial harm to its operations as a result of the employee's speech" (emphasis added).

According to the defendants' brief, they reasonably believed that the plaintiff's speech would have a potentially disruptive effect on the Investment Board's operations. They further assert that by taking the fee disclosure issue outside the Investment Board the plaintiff would undermine the trustees' authority to make investment policy. However, the defendants have presented no evidence that the plaintiff's speech was actually and substantially harmful to the effective functioning of the Investment Board. Indeed the defendants deny they terminated the plaintiff's employment because of his speech.

Some cases appear to require evidence of disruption. See, e.g., *Conner v. Reinhard*, 847 F.2d 384, 392 (7th Cir. 1988). Other cases allow a court to look at the ordinary or foreseeable effect of the speech in controversy and to determine whether it could be reasonably calculated to create division, to disrupt the office, to impair discipline, or destroy close working relationships. See, e.g., *Patkus v. Sangamon-Cass Consort.*, 769 F.2d 1251, 1258 (7th Cir. 1985); *Marquez v. Turnock*, 967 F.2d 1175, 1179 (7th Cir. 1992).

The defendants' bald assertions of the disruptive effect of the plaintiff's speech do not satisfy either standard. The

matters about which the plaintiff spoke were properly within the scope of his responsibility; it was [*350] his duty to see to it that public monies were not used improperly and that proper procedures were followed; the time, place and manner of his speech were appropriate; no confidential material was divulged. By first approaching the trustees with his concerns and then approaching the Attorney General and the State Auditor privately, the plaintiff attempted to minimize the disruption of working relations. Public confidence in the trustees' ability to perform their functions was thus not undermined by the plaintiff's disclosures. The parties dispute whether the speech arose in the context of the plaintiff's job security.

Citing *Rankin v. McPherson*, 483 U.S. 378, 390, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987), the defendants argue that the plaintiff's high rank would lead to confusion about whether he raised concerns as an individual or on behalf of the trustees. Nothing in the record, however, would lead one to believe that the plaintiff was speaking for the trustees on the issue of finder's fees or undue influence.

We would expect that the plaintiff's speech would cause friction and hostility with some or even most of the trustees. It would be absurd, however, to hold that the First Amendment authorizes public officials who believe themselves charged with misfeasance to punish an employee who has brought forth a matter of public concern because the speech caused friction between them and the employee and thus disrupted the office. *Czurlanis v. Albanese*, 721 F.2d 98, 107 (3d Cir. 1983) (quoting *Porter v. Califano*, 592 F.2d 770, 773–74 (5th Cir. 1979)). In this case, such friction or disruption must be weighed against the potential exposure of misuse of public monies and undue influence. The greater the public concern, the greater the disruption must be to give rise to qualified immunity. *Matherne v. Wilson*, 851 F.2d 752, 761, n.53 (5th Cir. 1988).

[*351] Under the circumstances of this case, the *Pickering* scales weigh in favor of the plaintiff. The plaintiff's First Amendment interests in his speech predominate over the defendants' assertions of disruption.

C.

The defendants do not rest, however, on the argument that the plaintiff's speech was disruptive. Rather, their primary argument is that his poor job performance justified his discharge. The defendants assert that in June 1989 they knew of the plaintiff's mismanagement, the staff's dissatisfaction with the plaintiff, and the "disruptiveness" of the plaintiff's presence as executive director. Thus, according to the defendants, the court must consider in the *Pickering* balance the defendants' assessment of the plaintiff's job performance aside from his speech.

The defendants rely on *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991), cert. denied, 117 L. Ed. 2d 475, U.S. , 112 S. Ct. 1242 (1992) and *Marquez v. Turnock*, 967 F.2d 1175 (7th Cir. 1992), to support their contention that job performance and factors other than the speech in question are relevant to the *Pickering* balancing. Their reliance on these cases is misplaced. First, since the cases were decided after June 1989, they are not relevant authority for determining what the defendants reasonably should have known at the time they discharged the plaintiff. More importantly, the cases do not support the defendants' position.

Elliott v. Thomas does not support the defendants' position that a public official's defense of acting properly goes to the issues to be decided at this summary judgment–qualified immunity stage. *Elliott*, 937 F.2d at 343.

[*352] In *Marquez* the court did not consider the employee's job performance apart from his speech. The court probed the *Pickering* balance and concluded on the basis of the employee's own evidence that his speech had disrupted the efficiency of the office and created "an intolerable situation." *Marquez*, 967 F.2d at 1179. Thus the issue was the disruptiveness of the speech in question, not the employee's general job performance.

We agree with the plaintiff that under the clearly established law in June 1989, job performance issues unrelated to the speech were not part of the *Pickering* balance. The defendants will have the opportunity at trial to show that the plaintiff would have been discharged even in the absence of the protected speech. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).

After considering the totality of the circumstances and applying the teachings of *Pickering* and its progeny, we conclude that the plaintiff's First Amendment rights outweigh the Investment Board's interest in prohibiting the speech or its right to discharge him for exercising the right to speak. *Conner v. Reinhard*, 847 F.2d 384, 388 (7th Cir. 1988). We further conclude that when the defendants discharged the plaintiff the defendants knew or should have known, on the basis of clearly established law, that the Investment Board's interests would not survive a balancing inquiry.

For the reasons set forth, we conclude that no further factfinding is required to decide the issue of qualified immunity and that the defense of qualified immunity does not shield the defendants from this suit.

[*353] IV.

We now turn to the motion to dismiss the plaintiff's claims for damages and equitable relief against the defendants in their official capacities.

We conclude that the plaintiff's suit for damages fails. The United States Supreme Court has held that the threshold inquiry for sec. 1983 actions for damages against public officials in their official capacities is whether the official is a person within the meaning of sec. 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989). Although it may seem obvious that state officials are persons, the Court has held that a suit for damages against a state official in his or her official capacity is a suit not against the official but against the official's office. As such it is no different from a suit for damages against the state. Accordingly, the Court has held that neither states nor their officials acting in their official capacities are persons under sec. 1983. We therefore dismiss the plaintiff's claim for damages against the defendants in their official capacity.

The plaintiff can, however, secure prospective, equitable relief from state officials in their official capacities. A state official sued for injunctive relief in his or her official capacity is a person under sec. 1983 and thus subject to suit, because "'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will v. Michigan Department of State Police*, 491 U.S. 58, 71, n.10, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) (citing *Kentucky v. Graham*, 473 U.S. 159, 167, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985)). See also *Hafer v. Melo*, U.S. , , 112 S. Ct. 358, 361-62 (1991).

The parties agree that to obtain injunctive relief the plaintiff must establish that the state officials who [*354] violated his rights were acting pursuant to state

policy or custom. *Hafer v. Melo*, U.S. , , 112 S. Ct. 358, 362 (1991). An official acts pursuant to state policy or custom under one of two circumstances. The act must be either pursuant to "a policy statement, ordinance, regulation, or decision adopted and promulgated by that body's officers"[14] or must be performed by an official who has "final policymaking authority."[15] Because the plaintiff cites no policy statement or decision promulgated by the trustees as applicable to this case, the question then is whether the defendants are final policymakers, in which case their acts could form the basis of official capacity liability.

Whether a person is a final policymaker is a question of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) (plurality opinion); *Pembaur v. Cincinnati*, 475 U.S. 469, 483, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (plurality opinion). The federal cases have taken several approaches to this issue. Some cases equate policymaking with legislative power, others with executive power. *Auriemma v. Rice*, 957 F.2d 397, 399 (7th Cir. 1992). When an official's discretionary decisions are constrained by policies set forth by another, that official is not a final policymaker as to those policies. Public officials are not final policymakers if, under state law, their decisions are subject to de novo review. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) (plurality opinion).

---

[14] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) (plurality opinion).

[15] City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) (plurality opinion).

[*355] In deciding whether the defendants are final policymakers for purposes of this suit, the parties appear to agree that the Investment Board has the statutory power to appoint an executive director and retains and exercises decisionmaking authority with respect to the plaintiff's employment.

The defendants assert, however, citing sec. 230.03(9), (11), 230.04, Stats. 1991-92, that the Department of Employment Relations has the "legislative" authority to make personnel policy for both the classified and unclassified divisions of the civil service. The defendants also contend that the legislature has retained policymaking authority with respect to retaliatory discharges. They base this argument on three statutes proscribing retaliatory discharges, secs. 230.83,[16] 230.85[17] and 895.65,[18] Stats. 1991-92. Section 230.83,

---

[16] Sec. 230.83 (1) provides:

> "No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employe."

[17] Sec. 230.85 (1) provides:

> "An employee who believes that a supervisor or appointing authority has initiated or administered or threatened to initiate or administer, a retaliatory action against that employe in violation of s. 230.83 may file a written complaint with the [personnel] commission. . . ."

[18] Sec. 895.65(2) provides:

> "An employe may bring an action in circuit court against his or her employer or employer's

Stats. 1991-92, for example, prohibits an [*356] appointing authority from administering any retaliatory action against an employee. Furthermore, argue the defendants, sec. 230.85 provides for de novo review by the personnel commission of an employee's complaint that an appointing authority has administered retaliatory action.

The defendants contend that the state's policy proscribing retaliatory discharges is manifest in these statutes. Thus, the defendants argue, if they had discharged the plaintiff in retaliation for speaking on a matter of public concern and if his interests outweighed those of the board, then the defendants violated rather the implemented state policy and could be sued in this action only in an individual capacity.

Sections 230.83, 230.85 and 895.65, Stats. 1991-92 do not apply to employees whose positions are assigned to an executive salary group.[19] The parties dispute whether these sections apply to the plaintiff and whether the plaintiff's position is within an executive salary group. While the executive director's position had at one time been within an executive salary group, it was later removed from that status. 1987 Wis. Act 399, secs. 91, 92, effective May 17, 1988. Therefore, as of June 1989, the

---

> agent, including this state, if the employer or employer's agent retaliates, by engaging in a disciplinary action, against the employe because the employe exercised his or her rights under the first amendment to the U.S. constitution by lawfully disclosing information or because the employer or employer's agent believes the employe so exercised his or her rights. . . ."

[19] The definition of employe under these statutes is "any person employed by any governmental unit except: . . . A person who is . . . assigned to an executive salary group under s. 20.923." Secs. 230.80(3)(b), 895.65(1)(b)2., Stats. 1991-92.

position of executive director was not within an executive salary group and was thus governed by these statutes protecting employes from retaliatory actions.

We therefore conclude that, for purposes of the issue presented in this case, the defendants are not final policymakers under Wisconsin law, and that the [*357] plaintiff cannot maintain this action against them in their official capacities.

Accordingly, we reverse that part of the decision of the court of appeals refusing to dismiss the plaintiff's claim against the defendants in their official capacities.

By the Court. The decision of the court of appeals is modified in part and as modified affirmed; reversed in part; and remanded.

Justices Roland B. Day and Janine P. Geske took no part.

WILLIAM A. BABLITCH, J. (concurring). I join both the reasoning and the result of the majority opinion. I also join the concurring opinion authored by Justice Wilcox. I write only to express a concern regarding one of the named defendants.

At oral argument, Mr. Burkes' attorney was asked the reason why Nicholas Hurtgen was named as a defendant in this matter. Although Hurtgen sometimes sits as trustee as the secretary's designee, Hurtgen did not sit as trustee in this particular matter, nor did he cast a vote. From the record before us, I can discern, at best, only peripheral involvement by Mr. Hurtgen. The answer given at oral argument was unsatisfactory.

JON P. WILCOX, J. (concurring). The majority correctly concludes that under the law as it exists today, these defendants are not entitled to the defense of qualified immunity. Because I am bound by that law, I concur with the majority's holding. I write separately, though, to express my dissatisfaction with what I perceive to be significant flaws in qualified immunity jurisprudence.

[*358] In a democratic society, the operation of government relies upon the participation of average citizens. Generally speaking, these individuals are not legal experts. Nonetheless, the positions they occupy, often at great personal sacrifice and without compensation, require them to make controversial decisions on matters of public importance without the luxury of time or complete knowledge. The doctrine of qualified immunity enables officials to carry out their vital public duties in a vigorous, principled manner. It is not in society's best interest to have these individuals subjected to personal liability whenever their conduct falls short of some legal ideal. In the end, qualified immunity acts to "protect the public at large, not to benefit its agents." *Wyatt v. Cole*, 118 L. Ed. 2d 504, U.S. , 112 S. Ct. 1827, 1833 (1992).

Society, of course, also benefits from the informed opinions of public employees. After all, these employees are often in the best position to know what problems may exist within an agency. No reasonable person can suggest that civic-minded, responsible individuals should be punished for voicing their opinion on matters of public concern.

The difficulty lies in trying to strike a balance between the employee's interest in expressing his or her views and the employer's interest in ensuring the effective and efficient fulfillment of its responsibilities to the public. *Pickering v. Board of Education*, 391 U.S. 563 (1968). In my view, the law unrealistically skews this balance,

leaving courts to express fine-sounding platitudes about the need for qualified immunity, but effectively limiting their ability to implement the doctrine.

The reason why is quite simple. Qualified immunity is an affirmative defense pleaded in a motion for [*359] summary judgment. At that stage, courts are bound to review the pleadings in the light most favorable to the party opposing the motion for summary judgment. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). In qualified immunity cases, that party will be the employee. Summary judgment can only be granted if, after giving every reasonable inference to the employee, the undisputed facts indicate that under no circumstances can the employee recover. *Id.*

This is proper. Matters that are in dispute, especially those which implicate a person's right to free speech, should not be disposed of at summary judgment. The problem with qualified immunity analysis is that it prevents courts from truly considering all the undisputed facts of a case. As a result, public officials are subjected to litigation and liability in cases where a more encompassing inquiry at the summary judgment stage would have recognized their right to qualified immunity.

As the majority explains, there are only two inquiries to be addressed at this stage:

> 1) whether Burkes' statements to the State Auditor and the Attorney General touched upon matters of public concern, *Connick v. Myers*, 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), and if so,
>
> 2) whether Burkes' interest in making the statements exceeded the trustees' interest in ensuring the effective and efficient fulfillment of their responsibilities to the

public. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

These tests limit courts to considering solely the employee's speech and the disruptive aspects of that speech. *Rankin v. McPherson*, 483 U.S. 378, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987); [*360] *Barnhill v. Board of Regents*, 166 Wis. 2d 395, 479 N.W.2d 917 (1992).[20] Thus, at the summary judgment stage on the issue of qualified immunity, courts cannot consider undisputed facts indicating that the employee's performance had been so poor that he or she was about to be fired anyway. Nor can courts adequately look at undisputed evidence that the employee's relationship with the employer was deteriorating, or that the employer has completely lost confidence in the employee's ability to perform his or her responsibilities for reasons unrelated to the speech.

In my opinion, *Connick*, *Pickering* and their progeny unduly limit a court's ability to review all undisputed facts when determining whether or not to recognize the defense of qualified immunity. The result is to place employers in a very difficult position. Suppose, for instance, the public employer has an employee who occupies an important, even vital government post. Suppose further that this employee's performance has been so poor, and his behavior so erratic, that the employer is legitimately concerned that its operations are threatened. In fact, it is so concerned that it is on the

---

[20] The idea that employers must demonstrate actual disruption, however, was rejected recently in *Waters v. Churchill*, U.S. , 1994 WL 223511 (U.S.)(1994), where the Supreme Court noted that its prior cases had "consistently given greater deference to government predictions of harm used to justify restriction of employee speech that to predictions of harm used to justify restrictions on the speech of the public at large." Id. at .

verge of discharging the employee. Getting wind of this, the employee rushes to the press or to law enforcement officials or even to the employer itself and makes accusations of corruption which may or may not be accurate. I believe that an employer in that situation [*361] should not be so intimidated by the fear of litigation that it fails to do what it reasonably believes is in the public interest. I would allow courts to consider these undisputed facts in the qualified immunity analysis.

The scenario described above is not so different, in my view, from what happened in this case. I believe the pleadings in this case, even when read in a light most favorable to Burkes, amply establish that his relationship with the trustees was deteriorating long before he raised his vague allegations of "influence peddling" and "employee intimidation" to the attorney general.[21] Ideally, all of the undisputed facts pertaining to Burkes' relationship with the trustees, even though unrelated to Burkes' actual speech, could be considered in a court's analysis of whether the trustees' decision to discharge Burkes was reasonable given the entire context of the relationship.

The approach I recommend is consistent with the sentiments, if not the analysis, expressed in many Supreme Court decisions. For instance, in *Waters v. Churchill*, U.S. , 1994 WL 223511 (U.S.)(1994), the Court observed that:

> The key to First Amendment analysis of government employment decisions, then, is

---

[21] It is undisputed that at the June board meeting, and again at the June 23 meeting at which he was discharged, Burkes told the trustees that he was not aware that anyone associated with SWIB had done anything illegal or even improper with respect to finders fees in the real estate division.

> this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But [*362] where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Id. at .

On other occasions, the Court has declared that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, U.S. , 112 S. Ct. 534, 537 (1991); *Anderson v. Creighton*, 483 U.S. 635, 638, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). The Court has also instructed that "in performing the [*Pickering*] balancing, the [employee's] statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin*, 483 U.S. at 388. Unfortunately, in my opinion, the Court then compromises these common sense sentiments by preventing courts from truly engaging in a comprehensive consideration of all undisputed facts.

I would favor lending substance to these sentiments by allowing courts in cases such as this to consider the entire context of the employment relationship. If, in light of all the undisputed facts, including those which preceded the employee's speech, it appears the employer reasonably believed its discharge of the employee was necessary to ensure efficient operations, I would grant qualified immunity. As the law stands today, nothing prevents a public employee whose job is threatened from making

vague allegations of corruption in order to acquire an immunity of their own, an immunity from the government's rightful exercise of its duty to ensure effective operations. Such a result is inconsistent with the goals qualified immunity is designed to further. ("Permitting damages suits against government officials can entail substantial [*363] social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638.) I believe qualified immunity requires us to engage in a more searching inquiry.

I am authorized to state that Justice William A. Bablitch and Justice Donald W. Steinmetz join in this concurring opinion.

STATE OF WISCONSIN IN SUPREME COURT
Case Nos. 92-2308, 92-2578

MARSHALL BURKES,
v.
JAMES R. KLAUSER, et al.

September 21, 1994

The court today issued an order in your case as follows:

Motion for reconsideration denied, with $50.00 costs. Justices Day and Geske took no part.

Marilyn L. Graves
Clerk of Supreme Court

STATE OF WISCONSIN COURT OF APPEALS
Case Nos. 92-2308, 92-2578

MARSHALL BURKES,
v.
JAMES R. KLAUSER, et al.

March 10, 1993

You are hereby notified that the Court entered the following order:

The defendant trustees ask that we reconsider our order of January 12, 1993. We grant their request, modify our order, and affirm our order as modified.

We direct the trial court on remand to hold an evidentiary hearing to the court to resolve genuine issues of fact as to what the trustees knew of Burkes's "speech" to the state auditor and the attorney general when they discharged him. When those issues of fact are resolved, the trial court shall:

(1) dismiss Burkes's first amendment claim as to any trustee who did not know of Burkes's "speech" when he or she voted to discharge Burkes;

(2) as to any trustee who knew of Burkes's "speech" when he or she voted to discharge Burkes, determine whether such trustee knew or should have known from clearly established law that the trustees could not discharge Burkes for that "speech" without violating his first amendment right to free speech;

(3) as to such trustee, dismiss Burkes's first amendment claim if the court concludes that the law was not clearly established that the trustees could not discharge Burkes because of his "speech;" or

(4) as to such trustee, deny the motion for summary judgment if the court concludes that the law was clearly established that the trustees could not discharge Burkes because of his "speech."

We emphasize that the evidence as to Burkes's job performance and why any trustee voted to discharge Burkes is not relevant to the issue of the trustees' defense

of qualified immunity and shall not be admitted at this hearing.[1]

The issue of qualified immunity is a threshold issue which should be resolved "long before trial." *Hunter v. Bryant*, 116 L. Ed. 2d 589, 595-96 (1991) ("Immunity ordinarily should be decided by the court long before trial.") The explanation is that qualified immunity is not only immunity from liability but immunity from suit. *Barnhill v. Board of Regents*, 166 Wis.2d 395, 415, 479 N.W.2d 917, 925 (1992). Thus, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The purpose of this rule is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* However, the public official defendants have been subjected to the "burdens of broad-reaching discovery," *id.*, which *Harlow* intended to limit. Hopefully, our order will insure that the defendant public officials will not be subjected any further to the burdens of pretrial discovery and other pretrial and trial activities until the question of their immunity from suit is decided.

---

[1]We note that the trustees in their petition for review erroneously argue the merits of their discharge of Burkes. They state: "The [lower] courts erred in [a] serious way when they failed to consider the damaging information the trustees possessed about Burkes['s] job performance." Joint Petition for Review at 19. Whether the trustees had cause to discharge Burkes will become an issue only if their defense of qualified immunity fails. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The trustees' statement of facts details at great length Burkes's deficient job performance and the motives of the trustees in discharging him. These "facts" are not to be considered by the trial court in deciding the issue of qualified immunity.

The trustees contend that because we summarily affirmed the trial court's denial of their motion for summary judgment, we have denied them effective review of the issue of their right to assert the defense of qualified immunity to Burkes' first amendment claim. We have not decided whether the trustees are entitled to qualified immunity. They will have the opportunity to review the trial court's decision on that issue when it is made.[2]

The trustees fault us for summarily deciding their appeal. However, once we grant leave to appeal, the appeal becomes subject to the rules of appellate procedure. We may dispose of an appeal summarily at any time. Rule 809.21(1), Stats. The submissions of the parties on the trustees' petition for leave to appeal convinced us that there were genuine issues of material fact which needed to be resolved before the threshold issue of qualified immunity could be decided.[3] As we have explained, the defense of qualified immunity, if available, is intended to avoid excessive disruption of government. We sought to expedite resolution of the question of the availability of the defense to the defendant trustees.

We recognize that if there is no genuine issue of material fact, summary judgment may be granted to any party. Section 802.08(6), Stats. We have therefore re-

---

[2]In *Baxter v. DNR*, 165 Wis.2d 298, 302 n.3, 477 N.W.2d 648, 650 n.3 (Ct. App. 1991), we said that a petition for leave to appeal from an order denying a public official's motion for summary judgment based on qualified immunity will ordinarily satisfy the criteria for grant of leave.

[3]Rule 809.50(1)(b), Stats., requires that the petition of the person seeking leave to appeal must contain a statement of the facts necessary to an understanding of the issues. The submissions of the trustees and the other parties were comprehensive and enabled us to summarily decide the appeal.

examined the submissions of the parties on the trustees' petition for leave to appeal, there request that we reconsider our order of January 12, 1993, and the trustees' petition for review of our order. We reaffirm our conclusion that there is a genuine issue of material fact as to the trustees' knowledge of Burkes's "speech" when they discharged him on June 23, 1989.[4]

When we issued our order of January 12, we had before us the trustees' "Summary of Facts," comprising 189 items, supported by citations to depositions and affidavits. Burkes did not claim that the trustees' references to the affidavits or depositions were incorrect.

There was also before us Burkes's memorandum in response to the trustees' petition for leave to appeal. That memorandum contains a lengthy recital of the facts, with references to affidavits and depositions. The trustees did not claim that Burkes's references were incorrect. We considered that we could rely on the parties to have faithfully described those parts of the depositions and affidavits they considered would contribute to our understanding of each party's position.

In the trustees' summary of facts, items 141 through 160 detail Burkes's meeting with the state auditor and the attorney general and include the

---

[4]In their petition for review, the trustees accept as true Burkes's deposition testimony as to what he told three or four of the trustees "about fee disclosure and influence." Joint Petition for Review at 11 n.7. However, the trustees claim that Burkes told the trustees "virtually nothing about his statements to the two state officials," *id.* at 18, and that the trustees did not know the "details" of Burkes's "speech." *Id.* at 16. The trustees' seeming admission that they do not dispute Burkes's testimony as to his "speech" to the state officials is therefore illusory. They wish us to accept as undisputed the facts with their "spin" on them.

questions Burkes left with these officials and excerpts from Burkes's deposition in which he described what he told the state officials. We note that the board's acting legal counsel accompanied Burkes. From this, the factfinder could infer that Burkes considered that he was acting in his official capacity.

Items 161 through 176 detail what happened at the meeting of the board on June 20, 1989, which Burkes did not attend.

Items 184 through 189 describe the meeting of the board of June 23, 1989, at which Burkes was discharged. Item 188 states that Burkes made a statement at that meeting, after which the board voted unanimously to discharge him. Item 189 states that: "No trustee based his or her vote upon Burkes's conversations with the Attorney General or the State Auditor." This item is referenced to affidavits by each of the trustees. The factfinder could infer from item 189 that the trustees were aware of Burkes's "speech" to the state officials when they voted to discharge Burkes.

Burkes's statement of facts, taken from his affidavit, includes the following: Burkes advised trustee Busby, vice-chairperson of the board, that he was contemplating discussing the finder's fee and influence peddling with the attorney general. Busby testified that this statement that he was going to the attorney general was a job performance concern for her. The acting executive director of the board, Patricia Lipton, told trustee Martin that Burkes was going to the attorney general. Burkes told trustee McMullen and alternate trustee Hurtgen of his reasons for speaking to the attorney general. Although McMullen and Hurtgen are not defendants, the factfinder could infer that because of their position, McMullen and Hurtgen discussed these conversations with the other trustees. Therefore, Burkes's assertions raise a strong inference that the trustees knew

of his "speech" to the state officials when they dismissed Burkes. If competing inferences may be drawn from the facts, summary judgment should not be granted. *Rach v. Kleiber*, 123 Wis.2d 473, 478, 367 N.W.2d 824, 827 (Ct. App. 1985).

Further, the affidavit of the trustees' counsel, Bruce A. Olsen, shows that in Burkes's deposition, he described his statement to the board in the following question and answer exchange:

> Q: The next notation?
> A: With this "influence peddling and intimidation," I felt it prudent to ask the auditor general and the attorney general's offices for advice in clearance of the pending transactions.
> Q: The next notation?
> A: "I trust that you, the trustees, will not retaliate against me."

Burkes was suspended from his duties as executive director of the board on June 20, the day after he went to the attorney general and the state auditor. The factfinder could infer from this sudden action that Burkes' visits to the state officials prompted the board to relieve him of his duties.

Burkes's statement of facts also includes that his "speech" with the attorney general about finder's fees was the subject of a "broad [ranging]" group discussion by the trustees at the June 20 meeting. Burkes also included in his statement of facts that Patricia Lipton told Janet Clark that Burkes could have had his job for as long as he wanted, "but he had to do this thing," referring to Burkes's speech to the attorney general. In a conversation with trustee Gates explaining what

happened at the June 20 meeting, trustee Martin indicated that Burkes had been to the attorney general.

The trustees have not persuaded us that the facts presented to us by the trustees and by Burkes are undisputed as to what the trustees knew about Burkes's communications with the state auditor and the attorney general and when they knew it. These disputed issues must be resolved by the trial court before the law can be applied to the facts.

We note that the trustees in their petition for review claim that in our order of January 12, 1993, we erroneously concluded that official capacity suits against state government officials do not require proof that the challenged action resulted from a state policy or custom. However, we did not address, on its merits, the trustees' motion for summary judgment to dismiss Burkes's official-capacity claim. That motion is premature until the threshold question of qualified immunity is decided.

IT IS ORDERED that we reconsider our decision of January 12, 1993, and reaffirm that decision as modified by this order.

IT IS FURTHER ORDERED that all other motions are denied as moot.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN COURT OF APPEALS
Case Nos. 92-2308, 92-2578

MARSHALL BURKES,
v.
JAMES R. KLAUSER, et al.

January 12, 1993

You are hereby notified that the Court entered the following opinion and order:

Before Sundby, LaRocque and Myse, J.J.

Before the court is a petition for leave to appeal, appeal No. 92-2308-LV, and a notice of appeal, appeal No. 92-2578, filed by James R. Klauser, Eugene G. Martin, Maureen J. Busby, Richard H. Lillie, Nicholas Hurtgen and Edward Hales, trustees of the State of Wisconsin Investment Board (SWIB) (hereafter, "trustees"). The trustees seek to challenge a trial court memorandum decision which denied the trustees' qualified immunity summary judgment motions. Also before the court is Marshall Burkes' cross-petition for leave to appeal that portion of the trial court's decision which granted the trustees' summary judgment dismissing Burkes' fourteenth amendment due process claim on the basis of qualified immunity.

We grant the petitions for leave to appeal, summarily affirm the trial court,[1] and remand with directions.

[1]Because we grant the petitions, and summarily affirm, the notice of appeal is moot, and that appeal is also dismissed in accordance with this order.

We first consider Burkes' fourteenth amendment cross-petition. We conclude that the trial court correctly found that Burkes was an "at will" employee. As such, he could be discharged without notice or hearing, and without cause. *Hough v. Dane County*, 157 Wis.2d 32, 40, 458 N.W.2d 543, 546 (Ct. App. 1990). Burkes had no protected property interest in his employment. Therefore, we summarily affirm the trial court's holding on this issue.

We next consider the trustees' claim that the trial court erred in failing to grant them qualified immunity from Burkes' first amendment claim. We construe the trial court's opinion to hold that, because there are genuine issues of material fact, the trial court was prevented from granting summary judgment. Under sec. 802.08(2), Stats., the court must determine whether a genuine issue exists as to any material fact. *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). If the court finds that a genuine dispute exists as to a material fact, it may not grant summary judgment to either party. Our review of the trial court's decision and the record reveals genuine issues of material fact which relate principally to Burkes' communications to the state auditor and the attorney general and whether and to what extent the trustees were aware of those communications when they suspended and subsequently discharged Burkes. However, we do not read the trial court's decision as finally deciding that the trustees are not entitled to qualified immunity from Burkes' first amendment claim.

We recognize that qualified immunity is a threshold question, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), which is usually decided on summary judgment because qualified immunity is immunity from suit rather than a defense to liability, *Barnhill v. Board of Regents*, 166 Wis.2d 395, 415, 479 N. W.2d 917, 925 (1992) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526

(1985)). Requiring the defendant public official to participate in a trial to resolve disputed issues of material fact largely negates the purpose of the qualified immunity defense. In *Harlow v. Fitzgerald*, the Court said that, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Id.* at 818.

However, where there are genuine issues of material fact to which "clearly established" law cannot be applied, the defendant public official seeking qualified immunity must necessarily submit to at least a limited trial, including discover, to resolve any genuine issue of material fact. See *Green v. Carlson*, 826 F.2d 647, 650-52 (1987). We leave it to the trial court on remand to exercise its discretion to reconcile the need to resolve the genuine issues of material fact with the public policy which calls for a determination of qualified immunity as a threshold matter. For example, the trial court may, in its discretion, arrange the proceedings so that the preliminary facts necessary for it to decide the qualified immunity issue are determined first.

Other motions are pending before us, such as a motion to strike, various motions relating to filing the record, and a motion relating to remanding a portion of this appeal in order to permit the trial court to act on the motion of a party who is not a party to this appeal. However, because of the manner which this appeal is resolved, all pending motions are dismissed as moot.

IT IS ORDERED that:

a. The petition and cross-petition for leave to appeal, appeal No. 92-2308-LV, are granted;

b. The memorandum decision of the trial court is summarily affirmed, and the matter is remanded to the trial court for further proceedings consistent with this order.

c. Appeal No. 92-2578, the appeal as of right of the trial court's order, is dismissed as moot.

d. All other pending motions are denied as moot.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN
CIRCUIT COURT DANE COUNTY
BRANCH 3

MARSHALL BURKES,
Plaintiff,
v. Case No. 89-CV-4227
JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE, NICHOLAS HURTGEN and M. WILLIAM GERRARD,
Defendants,
and
M. WILLIAM GERRARD,
Defendant-Third-Party Plaintiff,
v.
ACCELERATION NATIONAL INSURANCE COMPANY and RURAL MUTUAL INSURANCE COMPANY,
Third-Party Defendants.

September 1, 1992

All parties to this litigation have motions pending before the court. This decision addresses only one motion: the defendant-trustees' motion for summary judgment of dismissal of the plaintiff's constitutional claims on the

basis of qualified immunity.[1] The many other motions are not addressed in this decision for reasons of expediency.[2]

INTRODUCTION

Plaintiff, Marshall Burkes, ("Burkes"), was terminated from his employment as Executive Director of the State of Wisconsin Investment Board, ("SWIB"), on June 23, 1989, by the unanimous vote of the eight trustees of the board. On August 2, 1989, Burkes brought this action against five of the trustees and an alternate trustee, ("trustees"), under 42 USC §1983, ("§1983"), asserting that the trustees' action had deprived him of certain of his constitutional rights.[3]

The trustees have moved for summary judgment on the constitutional claims against them in their "individual capacities" on the basis of qualified immunity, and also

---

[1] Suffice it to say that the briefs on this motion alone total in excess of 250 pages, exclusive of the trustees' 35 page factual summary. Unfortunately, trial courts do not have the statutory authority to limit the length of briefs as do the appellate courts. §809.19(8)(c)1. and 2.

[2] Because a decision granting or denying qualified immunity is immediately appealable as a matter of right, delay in this decision needlessly prolongs the progress of this case.

[3] 42 USC §1983 provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivations of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

have moved for dismissal of Burkes' constitutional claims against them in their "official capacities" for failure to plead or prove that his dismissal constituted a "policy or custom" of SWIB.

QUALIFIED IMMUNITY

Qualified immunity is an affirmative defense to a §1983 suit for monetary damages available to governmental actors alleged to have deprived a person of his or her constitutional rights. Its applicability to the facts of the case is a question of law for the court which should be addressed at the earliest available point in the litigation. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

The reason this defense is available to governmental actors is two-fold: first, so that governmental actors are not intimidated into making or refusing to make decisions because of fear that the decision will expose them to a lawsuit claiming that the decision violated someone's constitutional rights; and second, to terminate as soon as possible otherwise prolonged litigation where the claim of constitutional deprivation has been made, but the governmental actor sued did not know and could not reasonably have known under the clearly established law at the time that his conduct would deprive the plaintiff of constitutional rights, and therefore is immune from suit.

The Supreme Court has provided some government officials with absolute immunity from damage suits for violations of constitutional rights. Generally speaking, absolute immunity applies to governmental actors functioning under legislative, judicial or prosecutorial immunity. In addition, governmental actors not acting under legislative, judicial or prosecutorial absolute immunity may be qualifiedly immune from suit under the specific facts of the case. The Supreme Court has held that all governmental officials performing discretionary

functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known. *Id.* at 818–9.

The test for qualified immunity is "objective" rather than "subjective". Therefore, its availability usually can be decided before trial on either a motion to dismiss or a motion for summary judgment. It rarely needs to await a full development or presentation of the facts surrounding the conduct alleged to be violative of constitutional rights. Rather, it can and should be decided, if possible, on the basis of undisputed facts or disputed facts viewed in the light most favorable to the person opposing the claim of immunity. These facts are viewed objectively, that is to say, through the eyes of a reasonable person acting under the same or similar circumstances.

In this case, the qualified immunity inquiry is: In 1989, would reasonable trustees know or should such trustees reasonably have known at the time they made the decision to terminate Burkes as Executive Director of SWIB following his visits to the State Auditor and the Attorney General, that this termination would deprive him of clearly established constitutional rights? If the answer to the inquiry is "yes", qualified immunity fails to protect the trustees from a suit for damages caused by the decision to terminate; if the answer is "no", the trustees are immune from a damage suit.[4]

---

[4] Admittedly, the question as posed appears to contain both an objective and a subjective component: what a person knows is a subjective determination; what a person should reasonably have known is an objective determination. However, this is the formulation that the *Harlow* court defined as the objective test for qualified immunity.

Qualified immunity presumes that the plaintiff has sufficiently alleged that the conduct in question deprived him of a constitutional right. This is so because a deprivation of a constitutional right is a *sine qua non* to a §1983 action, and qualified immunity is a defense to the action. However, to withstand the defense of qualified immunity, the constitutional right implicated by the facts must have been "clearly established" at the time the conduct was engaged in. The reason for this is made clear in *Harlow* at 818: "If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."

Therefore, the linchpin for the defense of qualified immunity is the determination whether or not the law was clearly established at the time the defendant acted such that the defendant knew or should have known that the action would deprive the plaintiff of a constitutional right. Subsumed in this determination is the degree of factual specificity required when defining the clearly established constitutional right by analogous caselaw.[5]

The most recent Supreme Court attempt to define the degree of specificity appears in *Anderson v. Creighton*, 483 U.S. 635 (1987). The Court said at 639:

---

[5] The issue is further complicated by the fact that the Supreme Court has not specifically addressed which party has the burden of proof on the question of clearly established law: is it on the plaintiff to show that the right he claims was deprived by the defendant's conduct was clearly established by analogous caselaw at the time, or is it on the defendant to show that his conduct did not deprive plaintiff of a right that was clearly established by the caselaw at the time? See, 23 Ga. L. Rev., 597, 634-42 (1989).

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. That is not to say that an official action is protected by qualified immunity unless the previous action has been held unlawful, but it is to say that in the light of the preexisting law the unlawfulness must be apparent. (citations omitted).

The first constitutional claim asserted by Burkes is under the First Amendment's freedom of speech provision. He alleges that his firing occurred in retaliation for having gone to the Legislative Audit Bureau and the Attorney General to express his concerns about finders-fees being paid to real estate brokers and suspected influence peddling occurring within SWIB. The second constitutional claim is under the 14th Amendment's deprivation of property provision. Burkes claims that he had a property interest in his employment as Executive Director of SWIB of which he was deprived without due process by his termination, i.e., without notice or hearing.

The trustees claim they are qualifiedly immune from suit under both constitutional claims.

SUMMARY JUDGMENT METHODOLOGY

Although the summary judgment methodology under §802.08, Stats., is well known and need not be set forth, its use in evaluating whether a §1983 case should be dismissed under the defense of qualified immunity is not as familiar and bears review. First, the complaint's constitutional claim is examined to make sure that the

facts alleged implicate a constitutional right and sufficiently allege deprivation of the right. Following examination of the complaint, the court then determines if the defendants have made a *prima facie* showing that they are entitled to qualified immunity. If this showing is made, the record is examined to determine whether material facts are in dispute so as to deny summary judgment on the qualified immunity defense, or if in dispute, whether the disputed facts, viewed in the light most favorable to the plaintiff, fail to overcome the defense of qualified immunity. [See, *Baxter v. DNR*, 165 Wis.2d 298, 303 et. seq. (Ct. App. 1991)].

FREEDOM OF SPEECH

Burkes claims he was fired for whistleblowing. The basic facts he relies on for this claim are succinctly stated below. These facts are either undisputed or are assumed for purposes of the trustees' summary judgment motion:[6]

1. Burkes began as Executive Director of SWIB on August 20, 1987. He was terminated on June 23, 1989. During this period, he was never formally disciplined, reprimanded or warned for any weaknesses or shortcomings in his performance.

---

[6] To say the least, these are not intended to summarize all of the facts of the case. For example, the trustees submitted a 35 page summary of facts containing 189 separate factual entries; Burkes' statement of facts in his brief covered more than 16 pages and contained the following caveat: "Rather than recite all of the pertinent facts in the statement of facts, it is easier to understand the substantial and material factual disputes by incorporating into the Argument specific factual references and their location in the record. Thus, the Statement of Facts will set forth the general sequence of events with certain significant details, but will not attempt to set forth every fact utilized in the Argument."

2. At the end of his first year as Executive Director, he received a $21,000 increase in his base salary and a $15,000 bonus.

3. In October, 1988, his performance was evaluated by the trustees and was characterized as "outstanding" by the chairperson, Busby. Other trustees, writing separately, also gave Burkes high marks for his performance.

4. In the spring of 1989, Burkes expressed concern about the handling of The Company Store investment,[7] and the reconsideration of the Santa Clarita proposal which had been rejected by SWIB in May, 1989. Both of these projects had been brought to SWIB by Gerrard. Burkes also claims he was becoming concerned about the influence Gerrard appeared to have with certain trustees.

5. In early June, 1989, Burkes proposed a policy to SWIB for disclosure of all finders-fees paid by recipients of SWIB loans in the real estate division. The proposal was opposed by the trustees and died at the June 8th board meeting for lack of a second.

6. On June 16th or 17th, certain trustees began planning a special meeting of the board to discuss Burkes' management of The Company Store investment problems. The meeting was scheduled for June 20th.

7. On June 19th, Burkes and Keith Johnson, SWIB acting legal counsel, went to the Legislative Audit Bureau and met with State Auditor, Dale Cattanach, and then to the office of the Attorney General and met with

---

[7] In 1987, SWIB invested $4.65 million in The Company Store. In 1988, an additional $5.35 million was invested. In February, 1989, The Company Store reported a loss of $6 million for 1988, and was facing bankruptcy or buy out.

Attorney General Donald Hanaway and his Deputy, Mark Musolf. Burkes claims he discussed his concerns regarding finders-fees and influence peddling. He left a list of 13 questions and a chart previously prepared for the June SWIB meeting showing finders-fees paid or potentially payable to Gerrard and other brokers.

8. The earlier scheduled meeting of the board was held on the evening of June 20th, the day after Burkes met with the State Auditor and Attorney General. Burkes was not in attendance, having left earlier that day to attend a seminar in California. At the meeting, the trustees relieved Burkes of his duties as Executive Director. Burkes was informed of the decision by telephone on June 21st.

9. On June 22nd, Burkes received a telegram repeating that he had been relieved of his duties and notifying him that a special meeting of SWIB had been called for June 23rd to consider his removal as Executive Director.

10. On June 23rd, Burkes was removed as Executive Director by unanimous vote of the eight trustees.

In my opinion, these facts in the complaint when viewed in the light most favorable to Burkes, support Burkes' claim that he was removed from his office in retaliation for speaking to the State Auditor and the Attorney General about finders-fees and influence peddling. The complaint states a claim for a deprivation of free speech under the First Amendment.

Although at trial, Burkes will be required to prove to the satisfaction of the jury by the greater weight of the credible evidence that the exercise of his free speech rights was, in fact, a motivating factor for his removal, *Mt. Healthy City School Dist. v. Doyle,* 429 U.S. 274, 287

(1977), this fact is assumed at this stage of the proceedings for purposes of the summary judgment motion.[8] *Rakovich v. Wade*, 850 F.2d 1180, 1210 (7th Cir. 1987). Also, at trial if Burkes shows that his free speech activity was a motivating factor, the trustees will be afforded the opportunity to prove that Burkes would have been discharged anyway, even in the absence of the protected speech. *Mt. Healthy*, supra. *Barnhill v. Board of Regents*, 166 Wis.2d 395, 417 (1992). This issue, likewise, is not before the court at this stage of the proceedings.

Therefore, in order for the trustees to prevail at this stage of the proceedings on the defense of qualified immunity, they must demonstrate under the objective test for qualified immunity that they could have reasonably believed either that Burkes' speech to the State Auditor and the Attorney General was not on a matter of public concern and, therefore, was not protected by the First Amendment (the so-called *Connick* test); or if on a matter of public concern, was overridden by SWIB's interest in the effective and efficient fulfillment of its responsibilities to the public (the so-called *Pickering* balancing test). These issues are measured against the clearly established

---

[8] In *Baxter v. DNR*, supra, the court of appeals stated that the summary judgment methodology requires the court to assume that the claimed constitutional right was implicated in the defendant's action. In that case, the Plaintiff claimed that her employer had failed to accommodate her handicap in violation of §1983 and the Rehabilitation Act of 1973. In footnote 4 at 303, the court stated: "So, for the purposes of qualified immunity analysis, we can assume that the defendants did not reasonably accommodate Baxter." The court, nevertheless, dismissed the action under qualified immunity, finding that the employer could have believed he reasonably accommodated the plaintiff's handicap under the clearly established law at the time.

law at the time. *Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Board of Education,* 391 U.S. 563 (1968).

In my opinion, the trustees fail to make a *prima facie* showing of qualified immunity under either test under the undisputed or assumed facts surrounding this constitutional claim.

1. Public vs. personal concern. Under the *Connick* test, the court examines Burkes' speech to determine if it represents speech on a matter of public concern or on a matter of private concern. Speech on a matter of private concern is not constitutionally protected.

The trustees argue that it is not unreasonable to conclude that Burkes went to the State Auditor and the Attorney General to seek outside agency support for his failed policy on disclosure of finders-fees -- an internal policy of SWIB. They argue this policy represented a matter of private concern. I disagree.

Burkes, whatever his motivation, went outside his agency with the topic of what he now characterizes as influence peddling within SWIB and misuse of public funds through the indirect payment of finders-fees, after the SWIB trustees soundly rejected his proposed policy on fee disclosure. He took the subject to the State Auditor whose job is to audit governmental agencies, and to the Attorney General, the highest law enforcement officer in state government. He was accompanied by the acting legal counsel for SWIB. He left with these officials a series of questions about finders-fees and influence peddling, and a chart of fees paid or potentially payable to a group of brokers. In my opinion, these facts make it unreasonable to assume that the trustees believed that Burkes' speech was only on a matter of private concern. In my opinion, his speech was clearly on a matter of public concern and reasonable trustees would have perceived it as such. The fact that Burkes did not go

beyond a private conversation with the State Auditor and Attorney General did not alter the public nature of the speech. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979).

Whistleblowing was a term known in 1989. The law was clearly established at that time and for a number of years before 1989 that so-called whistleblowing speech was protected by the First Amendment. In fact, it was recognized by statute in Wisconsin as early as 1983 and protected as early as 1985. §230.80 et. seq., and §895.65, Stats. As stated in *Barnhill* at 409:

> In 1985, there was already a wealth of case law on a public employee's First Amendment right to speak on matters of public concern. It was clearly established that a state may not discharge an employee on a basis that infringed on the employee's constitutionally protected interest in freedom of speech.

Therefore, assuming for the sake of argument that Burkes' visits to the State Auditor and the Attorney General were a cause of his discharge, and recognizing the meetings were on a matter of public concern, the trustees fail the *Connick* test of qualified immunity.

2. *Pickering balancing test.* Having found that Burkes' speech was on a matter of public concern, the next step of the qualified immunity analysis is to determine whether the "public employer's interest in confidentiality or the effective functioning of the employer's business can outweigh the employee's interest in his or her speech." *Barnhill* at 410.

Pickering instructs that even an employee's protected speech must give way under certain circumstances to the employer's rights. *Pickering* requires

the court to balance these competing interests. It sets forth a number of factors that can be considered when balancing these interests: the time, place and manner of the speech; the need for confidentiality; the need for discipline and harmony among co-workers; the need to curtail conduct which impedes performance of daily duties; and the need to maintain loyalty and confidence between the employee and his superiors. *Barnhill* at 410-11.

In my opinion, none of these factors are strong enough on the facts of this case to override Burkes' First Amendment rights. There was no need for SWIB to maintain confidentiality of finders-fees from the State Auditor or the Attorney General. There was no evidence at the time of Burkes' visits with these officials that his contact would be disruptive to staff or to trustees; would hamper performance by staff; or would breach loyalty and confidence with the trustees. In fact, none of these factors was given for Burkes' firing. The trustees' claimed reason for the decision to discharge Burkes was "to streamline and improve the efficiency of management at the Investment Board."

The trustees try to have it both ways: first, they argue that Burkes' speech was on a purely private matter, raised obliquely at best, not of public concern, and, therefore, should not be protected under the First Amendment. When that argument fails, they argue that exposing this subject matter even privately to high ranking governmental officials outside of SWIB was disloyal, disruptive, and a breach of confidentiality and should not be countenanced or protected. Under the *Pickering* balancing test, I conclude that Burkes' First Amendment rights outweigh SWIB's interest in prohibiting his speech or its right to discharge him for exercising the right to speak under the factors set forth in *Pickering*. This balancing test was clearly established in 1989, and the law tipping the scales in favor of the First

Amendment rights of an employee intending to disclose perceived influence peddling or misuse of government funds over the rights of an employer to prevent an employee's disclosure of such information was clearly established. *Conner v. Reinhard,* 847 F.2d 384 (7th Cir. 1988); *Roth v. Veteran's Administration,* 856 F.2d 1401 (9th Cir. 1988); and cases cited in Burkes' brief at p. 68 et. seq.

The trustees, therefore, fail to establish qualified immunity under the *Pickering* balancing test. Burkes' First Amendment claim survives summary judgment on the qualified immunity defense.

PROPERTY RIGHT

The second constitutional claim made by Burkes is that he was deprived of a property interest in his employment without due process in violation of the 14th Amendment. The trustees claim that they are qualifiedly immune from suit under this claim.

The trustees assert that Burkes' employment with the Investment Board was "at will" and, therefore, he did not have a property interest in his employment protected by the due process clause of the 14th Amendment. More importantly for the qualified immunity claim, the trustees argue that irrespective of whether or not Burkes later acquired a property interest in his employment, under the objective test for qualified immunity, the trustees could have reasonably believed that Burkes continued as an "at will" employee of SWIB and, therefore, had no property interest in his employment at the time he was removed. I agree.[9]

---

[9] The trustees have also moved to dismiss this constitutional claim for failure to state a claim. Although the analysis under the two challenges is different, the outcome is

For purposes of analysis of the trustees' motion for summary judgment, the following material facts are undisputed or assumed:

1. At the time Burkes was hired as Executive Director, §25.156(2), Stats. (1985-86), read as follows:

> (2) The investment board shall employ an executive director, who shall serve outside the classified service at the pleasure of the members of the board.

2. At the time of Burkes' hiring and discharge §19.42(13)(k) and §19.42(14), Stats., provided as follows:

> (13) "State public office" means:
> ...
> (k) The executive director, executive assistant to the executive director and investment directors of the investment board.
>
> (14) "State public official" means any individual holding a state public office.

3. At the time of Burkes' hiring and discharge, the Executive Director was hired by SWIB without the concurrence of the Governor. §17.07(6), Stats. provided and continues to provide:

> Removals from office of legislative and appointive state officers may be made as follows:
> ...

---

the same, and I elect to deal with the claim under the defense of qualified immunity.

> (6) Other state officers appointed by any officer or body without the concurrence of the governor, by the officer or body that appointed them, at pleasure, except officers appointed according to merit and fitness under and subject to or whose removal is governed by ch. 230 who may be removed only in conformity with said chapter.

4. At the time of Burkes' hiring, trustee Hales represented to him that he could only be removed "for cause", and Burkes relied on the representation when he accepted the position of Executive Director of SWIB.

5. In May, 1988, ch. 25, Stats., was amended in several respects by 1987 Wis. Act 399:

a). §25.156(2) was amended to delete the phrase "at the pleasure of the board."

b). All staff positions within SWIB except blue collar and clerical positions were transferred to the unclassified service.

6. The Legislative Reference Bureau analysis of 1987 Assembly Bill 850, which passed as 1987 Wis. Act 399 stated:

> Currently, all positions of the investment board are in the classified service, except the executive director, the executive assistant to the executive director and 6 investment directors. The bill places all positions of the board in the unclassified service, except blue collar and clerical positions. In the classified service, the law requires a merit recruitment and selection procedure; employes who complete a probationary period may not be terminated except for just cause subject to the right of appeal;... In the unclassified service, there

> is no merit recruitment and selection procedure required by law; employes may be terminated without the right of appeal in most cases;
>
> ...
>
> The bill removes all salary limitations upon unclassified employes of the board and permits the appointing authority of an employe (the board or executive director) to set any salaries and make any salary adjustments which the board can finance within its operating budget. In addition to an annual salary, the bill permits the board to establish a plan whereby an unclassified employe may be awarded bonus compensation for meritorious performance.

7. In April, 1989, SWIB adopted "Personnel Policies" which included at p.15:

> Dismissal is an action, taken by the Executive Director after consultation with the Investment Director/supervisor, which permanently removes an employee from the payroll.
>
> Dismissal of employees in the classified civil service is covered under s. 230.34, Wis. Stats. ...
>
> Reasons for Dismissal
>
> No person will be dismissed from his/her position except for cause. Reasons for dismissal include, but are not limited to, the following:
>
> ...

8. Burkes was removed from his position as Executive Director on June 23, 1989 without prior notice or hearing.

Without dispute, these facts establish that at the time Burkes was hired as Executive Director of SWIB in 1987, the statute governing his employment made him an "at will" employee of the Board. Section 25.156(2), Stats., provided that "the Investment Board shall employ an executive director, who shall serve outside the classified service at the pleasure of the members of the board." The statutory language clearly provided that one hired as Executive Director of SWIB could be fired without notice and hearing and regardless whether cause for discharge existed. "At will" employees do not have a property interest in their employment protected by the constitution. *Board of Regents v. Roth,* 408 U.S. 564 (1972). Burkes concedes this fact.

Burkes' claim, however, is that he acquired a property interest in his employment independent of the statutory language as a result of three occurrences: First, he claims that trustee Hales promised him at the time he was hired that he would be terminated only "for cause", and he accepted employment in reliance on that representation. Second, after being hired, the legislature amended §25.156(2) and removed the language that provided that the Executive Director serves "at the pleasure of the members of the board". Burkes argues that this statutory change authorized SWIB to make the Executive Director position removable "for cause". Third, following the amendment, SWIB adopted personnel policies that provided that "no employee of the Investment Board will be dismissed from his/her position except for cause." Burkes argues that these policies acted as SWIB's ratification of Hales' earlier promise to Burkes that he would only be removed "for cause", and reaffirmed the intent of the statutory change granting SWIB the option

to make the Executive Director's position a "for cause" position.

Each occurrence relied upon by Burkes will be examined separately to determine if it overcomes a *prima facie* showing of qualified immunity by the trustees.

1. Hales' promise. As noted above, at the time Burkes was hired, §25.156(2), Stats., made his position an "at will" position. Burkes argues that trustee Hales promised him "for cause" status in order to recruit him for the position. The trustees assume for the sake of the summary judgment motion on qualified immunity that Hales made the promise that Burkes would only be terminated for cause. They argue that even if a promise was made, it did not create a property right because Hales was without authority to make the promise or to bind SWIB in contravention of state statutory law. The trustees argue that a promise made without authority or made contrary to state law does not create a property interest in the employment. *Castelaz v. Milwaukee*, 94 Wis. 2d 513 (1980); *Hadley v. County of DuPage*, 715 F.2d 1238 (7th Cir. 1983); and other cases cited by trustees on pages 64-66 of their brief.

In my opinion, Burkes must concede the validity of this argument. Therefore, to overcome this argument, Burkes must show ratification of the promise by SWIB. In this regard, Burkes asserts that the personnel policies adopted by the board in April, 1989, served as SWIB's ratification of Hales' promise. I find this argument unpersuasive.

First, the personnel policies were adopted almost two years after Hales' purported promise of "for cause" status, and make no specific reference to a change in Burkes' status. It is not unreasonable to believe that if the trustees had intended to ratify a promise of "for cause" status, they would have done so by resolution of

the board and not by ambiguous personnel policies two years later. Second, as discussed in detail below, the personnel policies probably do not even apply to Burkes' position as Executive Director inasmuch as "discharge" is defined in the policies as "an action, taken by the Executive Director ... "

2. Amendment to §25.156(2). Burkes argues that the amendment to §25.156(2) in May, 1988, gave SWIB the discretion to make the Executive Director's position a "for cause" position, and the personnel policies adopted by SWIB in April, 1989, confirmed that the board did so provide. The trustees argue that the amendment to the statute in 1988 did not change the "at will" character of the Burkes' position for two reasons: first, the statute after the amendment continued the office of Executive Director "outside the classified service". The trustees assert, without contradiction, that unclassified employees have no property interest in their employment unless that interest is contractually or statutorily provided. *DH&SS v. State Personnel Board,* 84 Wis.2d 675 (1978); §230.34(1), Stats.

Second, the trustees argue that the amendment was not intended to change the "at will" status of the Executive Director, but was intended either to remove a redundancy in the statute[10] or to conform the statute to

---

[10] Since employees outside the classified service are "at will" employees, and since "at will" employees serve at the pleasure of the appointing or hiring entity, the trustees argue the former statute providing that the Executive Director served "outside the classified service" and, also, "at the pleasure of the members of the board" was redundant, and the amendment was intended to remove the redundancy. I rejected this argument in a decision rendered January 7, 1991, shortly after I received this case on reassignment. The trustees now ask me to reconsider and reverse that decision. I need not do so because I find that regardless of my decision, the trustees could have

the fact that the amendment was part of an overall statutory change placing all but clerical or blue collar employees of SWIB outside the classified service. In my opinion, under the test for qualified immunity, the trustees, acting reasonably under the circumstances, could reasonably have believed that Burkes continued as an "at will" employee of the board after the amendment to §25.156(2), Stats.

In addition, the trustees assert that the clearly established law in Wisconsin on employment rights at the time Burkes was terminated provided that his employment rights attached at the time he was hired, irrespective of an amendment to the statute after his hiring. *Moses v. Board of Veterans Affairs*, 80 Wis.2d 411 (1977). Burkes does not dispute this assertion, but argues that Hales' promise coupled with the personnel policies overcame the statutory "at will" status by contractually creating a property right in Burkes' position. As noted above, I find this argument unpersuasive.

3. *Personnel policies.* Burkes relies on the personnel policies adopted in April, 1989, to attempt to overcome the trustees' reasonable belief that Burkes continued as an "at will" employee in June, 1989. Specifically, Burkes relies on the language under "Reasons for Dismissal" at p. 15: "No person will be dismissed from his/her position except for cause."

The trustees argue that this provision does not refer to the position of Executive Director. They argue that "dismissal" is defined on p. 15 as "an action, taken by the Executive Director after consultation with the

---

reasonably believed in 1989 that the amendment did not change Burkes' status from "at will" and under the objective test for qualified immunity, reasonable belief at the time of the decision is what controls, not my subsequent interpretation.

Investment Director/supervisor which permanently removes an employee from the payroll." (emphasis added). Further, the employee's rights set forth on p. 16 require that "An employee who is to be dismissed shall receive a written statement from the Executive Director setting forth the reasons for dismissal ... The employee [can] submit in writing a statement objecting to the action and appealing to the Executive Director. The Executive Director will review the appeal and prepare a written response to the employee ... The employee [can] submit in writing, a statement objecting to the Executive Director's decision and appealing to the Board of Trustees." The trustees assert that dismissal of the Executive Director under these provisions would create an anomalous and absurd procedure which, in effect, would require the Executive Director to remove himself and review his own removal.

Burkes concedes that these provisions cannot apply to the Executive Director and agrees that only SWIB can remove the Executive Director, but argues that the policy provisions relating to appealing a discharge to the board apply. This argument is also unpersuasive.

The policies provide that on the Board of Trustees' review, "it may appoint a hearing examiner to investigate the dismissal action [who will investigate and] submit a report with a recommendation to the Board regarding the investigation of the case ..." This procedure is equally absurd if it applies to the board's removal of the Executive Director because it suggests that the Board would submit its own action to a hearing examiner to review the very action the Board, itself, took.

In my opinion, the more reasonable reading of the personnel policies is that they apply to staff positions removed from the classified service as a result of the statutory amendments to ch. 25, and were designed to provide these employees with "for cause" protection. They

do not alter the Executive Director's employment rights. Again, for purposes of qualified immunity, under the objective test of *Harlow/Anderson*, the trustees, acting reasonably, could have reasonably believed that Burkes continued as an "at will" employee when they terminated him in June, 1989.

Therefore, for all of the foregoing reasons, I conclude that under the test for summary judgment under the defense of qualified immunity, the trustees have set forth a *prima facie* showing of qualified immunity under the 14th Amendment property claim asserted by Burkes. I find that the trustees acting under clearly established law in 1989 reasonably could have believed that Burkes continued as an "at will" employee of the board and could be discharged without notice or hearing, and without cause. I further find that the material facts are not in dispute, or where disputed, viewed in the light most favorable to Burkes, do not overcome the defense of qualified immunity. Therefore, Burkes' claim for damages under the 14th Amendment property claim is dismissed.

BURKES' OFFICIAL CAPACITY CLAIMS

Burkes has brought his §1983 claim against the trustees both in their individual capacities and in their official capacities. Qualified immunity protects state officials from damage actions brought against them in their individual capacities. Therefore, the previous discussion relating to qualified immunity does not relate to Burkes' claim for constitutional deprivations brought against the trustees in their official capacities.

Historically, the reason for the distinction between "individual capacity" suits and "official capacity" suits was based on the concept of sovereign immunity which provides that states cannot be sued without their consent. The U.S. Supreme Court has recently held that suits brought against state governmental officials acting in

their "official capacities" are the same as suits brought against the State, and neither a State nor state officials acting in their official capacities are "persons" under §1983 for purposes of damage suits. *Will v. Michigan Department of State Police,* 491 U.S. 58 (1989).

However, at the same time, the Supreme Court held that state officials acting in their "official capacities" can be sued for prospective, equitable relief. According to the Supreme Court, state officials are "persons" under §1983 for prospective relief because "official-capacity actions for prospective relief are not treated as actions against the State." *Id.* at ftnt. 10; *Hafer v. Melo,* 502 U.S. ____, 112 S.Ct. 358 (1991).

Nevertheless, the trustees move for summary judgment on the "official capacity" claims on the basis that Burkes has not shown that his dismissal constituted a "policy or custom" of SWIB. The trustees argue that this showing is a requisite to an official capacity suit against a state official. I disagree.

The concept of "policy and custom" for liability under §1983 arises from the early debate over municipal liability, not state officials' liability. In *Monell v. Department of Social Services,* 436 U.S. 658 (1978), the Supreme Court abrogated municipal immunity from damage suits under §1983 and held that municipalities could be sued, but only if the constitutional injury was caused by an official policy of the municipality.[11]

The cases relied on by the trustees confirm this principle: *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986); *City of St. Louis v. Praprotnik,* 491 U.S. 469 (1986); *Jett v. Dallas Ind. School Dist.,* 491 U.S. 701

---

[11] Therefore, municipalities cannot be sued under §1983 under the doctrine of *respondeat superior.*

(1989). They hold that municipalities are "persons" under §1983 for purposes of damage claims when injury is caused by an official "policy or custom". *Monell*, supra. On the other hand, state officials acting in their official capacities are "persons" under §1983 only for purposes of prospective relief, because such relief is not barred by a state's sovereign immunity, and liability for this relief is not dependent on the "policy or custom" analysis. *Will*, supra; *Hafer*, supra.

Therefore, Burkes' claim against the trustees in their "official capacities" is limited to prospective relief. To the extent the trustees' motion for summary judgment of dismissal against Burkes' claim of constitutional deprivation by the trustees in their "official capacities" is based upon the failure to plead or prove that the decision to terminate Burkes was based on a SWIB "policy or custom", the motion is denied. Of course, the form and extent of the prospective relief afforded under this cause of action is not determined in this decision.[12]

CONCLUSION

For the foregoing reasons, the trustees' motion for summary judgment dismissing Burkes' 14th Amendment property claim on the basis of qualified immunity is GRANTED. The trustees' motion for summary judgment dismissing Burkes' First Amendment freedom of speech claim on the basis of qualified immunity is DENIED. The motion for summary judgment dismissing Burkes'

---

[12] Not included in this decision are individual or joint motions for summary judgment brought by alternate trustee Hurtgen, trustees Lillie and Busby, trustees Klauser and Martin, and trustee Hales on grounds other than qualified immunity. These issues will be addressed in upcoming decisions.

constitutional claims against the trustees in their "official capacities" is DENIED.

So ordered.
Dated: September 1, 1992.

BY THE COURT:
P. Charles Jones, Circuit Judge

STATE OF WISCONSIN COURT OF APPEALS
Case Nos. 92-2308, 92-2578

MARSHALL BURKES,
v.
JAMES R. KLAUSER, et al.

February 5, 1991

You are hereby notified that the Court entered the following opinion and order:

Before Eich, C.J., Dykman and Sundby, J.J.

The petitioners petition for leave to appeal from the trial court's nonfinal order denying their motion to dismiss portions of the plaintiff's complaint. We conclude that the petitioners have not satisfied the criteria for granting leave.

IT IS ORDERED that the petition is denied. The motion for temporary relief is rendered moot by this order.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN
CIRCUIT COURT DANE COUNTY
BRANCH 3

MARSHALL BURKES,
Plaintiff,
v. Case No. 89-CV-4227
JAMES R. KLAUSER, et. al.
Defendants,

MEMORANDUM DECISION
DENYING MOTION TO DISMISS

January 7, 1991

Defendants Klauser, Martin, Hales, Busby, Lillie, and Hurtgen (state defendants) move for dismissal of this 42 U.S.C. §1983 action on several grounds.[1] Plaintiff's state claim against defendant Gerrard is unaffected by this decision.

I find that the plaintiff has stated sufficiently a claim upon which relief may be granted to survive a

---

[1] On October 8, 1990, the Attorney General advised the court and all parties that his office intended to withdraw as counsel for defendant Hales, citing the appearance of a conflict between him and the other state defendants. On October 22, 1990, I signed an order permitting the withdrawal, and directing the Assistant Attorneys General to instruct Hales' new counsel to file a notice of appearance when appointed. To date, no such notice has been filed. However, I do not believe Mr. Hales' position is jeopardized by proceeding in the absence of new counsel, given my rulings on the pending motions.

motion to dismiss. I find, further, that the state statutes do not determine whether plaintiff had a property interest in his job. I find that plaintiff has alleged the violation of a clearly established right sufficient to survive the state defendants' assertion of qualified immunity on a motion to dismiss. The remainder of the issues, however, cannot be adequately resolved on a motion to dismiss. Therefore, the state defendants' motion to dismiss is denied.

Procedural Posture

This case was originally assigned to Judge Angela B. Bartell. On March 30, 1990, Judge Bartell issued a memorandum decision and order on this and other motions to dismiss. Following her decision, however, she disqualified herself from further proceedings in this matter, and the case was assigned to this branch. I am faced with the issues left unresolved by her decision.

Judge Bartell dismissed the State of Wisconsin Investment Board (Board) as a defendant, and dismissed the trustees of the Board in their official capacities. Judge Bartell denied defendant Gerrard's motion to dismiss. On the state defendants' motion to dismiss, Judge Bartell ordered them to elect between converting their motion into a motion for summary judgment, thereby allowing matters outside the pleadings to be considered, or to restrict the motion to matters asserted in the pleadings. She deferred ruling on the motion until an election had been made. The state defendants elected to proceed on the motion to dismiss without reference to matters outside the pleadings. I, therefore, cannot consider matters outside the pleadings in deciding the motion.[2]

---

[2] Judge Bartell's order dismissing the Board and official capacity claims against the trustees and directing an election by the trustees is the law of the case.

Briefly, the complaint alleges that plaintiff was the former Executive Director of the State of Wisconsin Investment Board, and was discharged from his position in retaliation for exercising his First Amendment free speech rights. It further alleges that plaintiff was denied a property interest in his employment when he was discharged without notice and hearing. State defendants Klauser, Martin, Hales, Busby and Lillie were trustees of the Board, and defendant Hurtgen was an alternate trustee for Klauser when the discharge occurred.

Facts

Plaintiff brings this action under 42 U.S.C. §1983, seeking damages and reinstatement arising from his termination as executive director of the Board. The state defendants are trustees of the Board and an alternative trustee. The Board manages and invests retirement funds for State of Wisconsin employee participants.

The facts plaintiff has pleaded against the trustees must be taken as true for purposes of the motion to dismiss. *Evans v. Cameron*, 121 Wis.2d 421, 426 (1985). The factual background of the case based upon the allegations of plaintiff's complaint is as follows:

On August 20, 1987, plaintiff was hired as executive director of the Board. In October, 1988, plaintiff received an excellent performance review from the trustees. Later, plaintiff became concerned with various activities of defendant Gerrard in dealing with the Board staff and trustees. He also became concerned with fees that Gerrard received for arranging for the Board to invest in projects. Plaintiff expressed his concerns to various trustees. He also proposed a system whereby fees paid to finders of projects would be disclosed. On June 19, 1989, plaintiff raised some of his concerns with the Attorney General and the Legislative Audit Bureau. On June 21, 1989, plaintiff was informed that he was

relieved of his duties. On June 22, 1989, plaintiff received notice from Trustee Martin that his dismissal was to be considered by the Board on the following day, and on June 23, 1989, plaintiff was terminated. The reason given for plaintiff's termination was that "his dismissal was needed to streamline management and improve the efficiency at the Investment Board."

Plaintiff asserts that he could only be fired for just cause. He basis this assertion on promises made by Trustee Hales as chair of the Board when plaintiff was hired, and upon personnel policies adopted by the Board. Plaintiff also alleges that he was fired in retaliation for exercising his First Amendment right to free speech, and that his Fourteenth Amendment due process rights were violated when he was fired without notice or hearing.

Issues

State defendants raise five issues which were left unresolved by Judge Bartell's decision: (1) defendant Hurtgen contends that he did not have the requisite personal involvement in the decision to terminate plaintiff and must be dismissed; (2) state defendants contend that plaintiff did not have a property interest in his job; (3) state defendants contend that plaintiff had adequate state remedies for any wrong suffered, and, therefore, a §1983 action is inappropriate; (4) state defendants claim that they enjoy a qualified immunity which bars this action because plaintiff has failed to plead actions which violated clearly established law; and (5) state defendants contend that plaintiff has failed to state a First Amendment claim upon which relief can be granted because he failed to plead sufficient allegations of retaliatory motive. These issues will be decided *seriatim*.

Defendant Hurtgen

Plaintiff has alleged that Hurtgen was personally involved in the decision to terminate his employment. State defendant Hurtgen's motion to dismiss relies on matters outside the pleadings to establish a lack of involvement in the decision to fire plaintiff. Therefore, the motion to dismiss must be denied.

Property Interest

State defendants contend that the Wisconsin statutes require the conclusion that the job of executive director of the Board did not create a property interest for plaintiff. They further contend that even if the statutes are not dispositive of the issue, plaintiff has not shown that a property interest was created. Plaintiff contends that the statutes leave open the option to make the executive director position a "for just cause" position, and the trustees exercised that option through Trustee Hales' representation that plaintiff would only be fired for cause and through personnel guidelines adopted by the Board.

The state defendants' first argument is that §17.07(6), Stats., states that state officers not appointed with the concurrence of the governor serve at the pleasure of the officer or body that appointed them. I need not address the issue of whether the executive director of the Board is a state officer under §17.07, because §25.156(2) directly controls the status of the executive director. I look to the obviously controlling specific statute rather than the more general law applicable to state officers.

§25.156(2), Stats., reads in relevant part:

> The investment board shall employ an executive director, who shall serve outside the classified service.

The state defendants argue that because the position is outside of the classified service, it is an "at will" position. I reject this argument in light of the statutory change in §25.156(2) made by §95 of Act 399 (Laws of 1987). Prior to the change, the statute provided as part of the above-quoted language that the executive director "...shall serve outside the classified service *at the pleasure of the members of the board*." (emphasis added). §95 of Act 399 deleted the highlighted language. The only persuasive purpose served by the legislative deletion of this phrase is to allow the trustees the option to hire an executive director who is only terminable for just cause. The amendment gives the Board the opportunity and flexibility to decide whether the executive director should be terminable at will or for cause. Any other purpose for the amendment is strained.

State defendants also contend that the executive director, in fact, was maintained as a terminable at will position. Plaintiff alleges that the Board's personnel policies and Trustee Hales' promises to the contrary made his position terminable only for just cause. Unlike plaintiff's allegations which must be taken as true, the state defendants' arguments on this contention rely on matters outside the pleadings, and cannot be considered on the motion to dismiss.

Adequacy of State Remedies

Judge Bartell's decision at pp. 6-8 concluded that the determination of whether plaintiff had adequate state remedies must await a conclusion of the property interest issue. I agree. Although the motion to dismiss on this basis must fail for the reasons stated above, the question of whether plaintiff actually had a property interest in his job cannot be conclusively determined at this time. Therefore, I must withhold determination of whether plaintiff's state law remedies were adequate to bar a §1983 action.

Qualified Immunity

Generally, the issue of qualified immunity, as an affirmative defense, is handled on a motion for summary judgment, not on a motion to dismiss. *Landstrom v. Illinois Dept. of Children & Family Services*, 892 F.2d 670, 675, n. 8 (7th Cir. 1990). §802.02(3), Stats. In *Landstrom*, the 7th Circuit permitted the issue to be resolved on a motion to dismiss by stating that the complaint failed to state a claim upon which relief could be granted. However, the analysis of whether plaintiff has alleged a violation of a clearly established constitutional right is much more complex. This question can only be treated in a very general fashion on a motion to dismiss.

Plaintiff makes allegations concerning his First and Fourteenth Amendment rights. I find that he has alleged violations of clearly established rights on both sufficient to survive a motion to dismiss. The complex balancing which the state defendants ask the court to engage in must await proper pleading of the affirmative defense of qualified immunity and a motion for summary judgment.

The Fourteenth Amendment claim rests on plaintiff's allegation that the was denied due process when he was fired from a job in which he had a property interest without notice, a pretermination hearing, or procedures for a prompt post-termination hearing. Without dispute, some process was due plaintiff if, in fact, he was terminated from a job in which he had a property interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). I have already found that the issue of whether plaintiff had a property interest in the job cannot be determined on this motion to dismiss. Likewise, it is impossible to determine whether the state defendants violated a clearly established right without determining if plaintiff did have a property interest in the job.

The law is clearly established that a public employment may not be terminated for public or private expressions protected by the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563 (1968). What expressions are clearly established to be protected, however, is a complex analysis. The content of the expression; the public or private nature of the expression; the time, manner and place of the expression; the need for confidentiality of the expression; and the need of the employer to maintain a properly functioning workplace must all be considered in the analysis. This analysis simply cannot be done by the court on the basis of a complaint.

In my opinion, the state defendants have failed to show that plaintiff has not stated a claim upon which relief can be granted pursuant to §802.06(2), Stats., because plaintiff has made general allegations of violations of clearly established constitutional rights. Qualified immunity is an affirmative defense which should be raised in a responsive pleading and dealt with on a motion for summary judgment. §802.02(3), Stats.

Sufficiency of the First Amendment Claim

The state defendants move for dismissal of plaintiff's First Amendment claim on the grounds that plaintiff has failed to plead particularized facts demonstrating the alleged constitutional deprivation necessary to state a cause of action. Plaintiff contends that the alleged sequence of events leading to his termination is sufficient to establish an inference of retaliatory motive for his termination by defendants. I agree.

Plaintiff is required to plead particularized facts demonstrating the alleged constitutional deprivation to state a claim under §1983. *Cohen v. Illinois Institute of Technology*, 581 F.2d 658, 663 (7th Cir. 1978). In an

action alleging retaliation for the exercise of a constitutionally protected right, merely alleging the ultimate fact of retaliation is insufficient. *Benson v. Cady*, 761 F.2d 335, 342 (7th Cir. 1985).

The Seventh Circuit has stated the law on the sufficiency of a complaint which alleges a chronology of events in *Murphy v. Lane*, 833 F.2d 106, 108 (7th Cir. 1987), quoting *Benson*, supra at 342:

> Recognizing that the ultimate fact of retaliation for the exercise of a constitutionally protected right rarely can be supported with direct evidence of intent that can be pleaded in a complaint, courts have found sufficient complaints that allege a chronology of events from which retaliation may be inferred. (citations omitted).

The state defendants maintain that *Benson* stands for the proposition that there must be some particularized facts independent of merely a chronology pleaded to raise an inference that they acted with a retaliatory motive. The above-quoted language from *Benson* makes clear, however, that a chronology of events may be sufficient in a complaint to raise the inference of retaliation. In upholding the dismissal of the complaint, the *Benson* court merely analyzed the chronology of events pleaded and found the complaint insufficient on the particular alleged facts of the case.

In *Murphy*, the Seventh Circuit reversed a District Court's dismissal of the complaint where the complaint alleged a chronology of events from which retaliatory animus arguably could be intended. The court found the immediacy of the adverse action following the exercise of the constitutionally protected right permitted the inference of retaliation. *Id.* at 109 n. 1.

In *Collins v. State of Illinois*, 830 F.2d 672 (7th Cir. 1987), the court reversed a District Court's judgment notwithstanding the verdict on the grounds that an adverse employment action's rapidity and proximity in time to the plaintiff's expression of protected speech provided sufficient evidence for a jury to find a retaliatory motive. I find that *Collins*, *Benson* and *Murphy* clearly hold that a chronology of events can be sufficient to allow the inference of a retaliatory motive when the adverse action closely follows the exercise of a protected constitutional right.

Plaintiff has pleaded a chronology of events sufficient to state a First Amendment claim. As alleged, in October, 1988 plaintiff received an outstanding job performance evaluation. Several months later, plaintiff began expressing concerns regarding finders fees being paid in relation to investments made by the Board and the influence of defendant Gerrard on the Board staff and members. In early June, 1989, Trustee Hales told plaintiff that pursuing the full disclosure of finders fees would hurt plaintiff's future with the Board. On June 19, 1989, plaintiff met with the Attorney General and the State Auditor and expressed his concerns about "finders fees, influence peddling, and intimidation tactics." On June 21, 1989, Trustee Martin contacted plaintiff and stated that plaintiff was relieved of his duties. On June 23, 1989, the Board terminated plaintiff at a special meeting.

I find that the alleged rapidity and proximity in time of plaintiff's termination to his expression of concerns to the Attorney General and the State Auditor sufficiently alleges a chronology of events from which retaliatory motive could be found by a finder of fact. Therefore, the motion to motion to dismiss the First Amendment claim for failure to state a claim, likewise, is denied.

Conclusion

It was noted at the beginning of this decision that the state defendants' election to proceed on the motion to dismiss without resort to matters outside the pleadings made resolution of many of the issues raised impossible. It is clear that this case must proceed to responsive pleading and discovery. In all likelihood, many of the issues raised in the motion to dismiss will be raised again in the context of motions for summary judgment. Definitive decision must await that process.

Motion denied.

Dated: January 7, 1991

BY THE COURT:
P. Charles Jones, Circuit Judge

AFFIDAVIT OF BRUCE A. OLSEN
(EXCERPTS [R.25: 1-55, emphasis added])
(Formal portions omitted)

---

9. I was present at the deposition of plaintiff Marshall Burkes on April 24, 1992.

10. In his April 24, 1992, deposition, Burkes was asked the following questions and gave the following answers:

Q Paragraph 57 of the complaint alleges that you talked to the trustees after you went to the attorney general and the Legislative Audit Bureau, is that true?

A Yes, I placed a call to each trustee.

Q Were you able to talk to all the trustees?
A No.

R.25: 28; Burkes deposition, page 140.

Q Which trustees were you able to get ahold of that afternoon?
A Gary Gates, as I recall.
Q And who else?
A I think I talked to Mr. McMullen.
Q Do you recall reaching anybody else?
A Mr. Hurtgen called back at 10:00 for Mr. Klauser that evening.
Q Did you reach anybody else?
A I don't specifically recall.
Q Were you able to reach Mr. Hahner?
A Mr. Hahner, no.
Q Did you talk with Dr. Lillie?
A Not that I recall.
Q Did you talk to Mr. Martin?
A I don't remember getting a return call from Mr. Martin.
Q Did you speak with Ms. Busby?
A I do not remember getting a return call from Ms. Busby.
Q Did you not speak directly with Mr. Klauser that day?
A No.
Q Did you talk with Mr. Hales?
A I do not specifically recall talking to Mr. Hales.

R.25: 28-29; Burkes deposition, pages 141-42.

Q Tell me everything you told Mr. Gates in that conversation.
A I do not recall other than to indicate to him that I had made the two meetings.

Q Did you tell him anything about the substance of those meetings?
A No.
Q Did you tell him the purpose of those meetings?
A I don't remember going into detail.
Q You told him that you had gone to the attorney general and the state auditor?
A Yes.
Q And do you recall telling him any other thing in that conversation?
A Not specifically.
Q Anything in general that you were talking to him about in the conversation?
A No.

R.25: 29; Burkes deposition, pages 142-43.

Q Did you tell Mr. McMullen that you had gone to the attorney general and the auditor?
A Yes.
Q Tell me everything you told him in that regard.
A I just informed him that I had gone to the attorney general and the state auditor, and his response was that he was very disappointed to hear that there was a need to do that.
Q Did you tell him why you had gone?
A Yes. Mr. McMullen was very aware of my concern about undisclosed fees.
Q Did you tell him that that was the reason you had gone to the attorney general?
A I indicated that that was one of the reasons.

R.25: 30; Burkes deposition, page 146.

Q Did you tell Mr. McMullen you went to the attorney general because you were concerned about undue influence?

A Yes.

Q Did you tell Mr. McMullen you had gone to the attorney general because you were concerned about fee disclosure?

A Yes.

Q Did you tell Mr. McMullen anything else about your visit to the attorney general or state auditor?

A Not that I specifically recall.

Q Did you tell him that you had left a list of questions with both the attorney general and the auditor?

A That was not discussed.

Q Did you tell him that you left questions with these whether it was discussed or not?

A I don't remember telling him that.

Q Did you tell him whether you left a chart with either the attorney general or the auditor?

A I don't remember telling him that, but Mr. McMullen and other trustees had a copy of the charts which I handed out in the executive session in the regular board meeting earlier that month.

Q You did not tell him that you gave that chart to the attorney general and the auditor?

A No, not that I recall.

Q Did you discuss with Mr. McMullen any of the questions contained on the list?

A No.

Q Have you told me everything that you can recall that you told Mr. McMullen about your visit to the attorney general and the auditor?

A Yes.

R.25: 30-31; Burkes deposition, pages 147-48.

Q Tell me everything that you said in your conversation with Mr. Hurtgen when he called back at 10:00 that night.

A I remember indicating that I was sufficiently concerned and felt it necessary to go to the attorney general and the state auditor. He didn't have many questions, and I was a little concerned that he didn't realize the significance of these issues particularly in terms of matters of public concern.

Q How long did this conversation last?

A Less than five minutes.

Q And what you told him, to the best of your recollection, the words that you used were that you were sufficiently concerned and that you went to the attorney general and the auditor?

A Right.

R.25: 32; Burkes deposition, page 154.

Q Did you tell him that you went to the attorney general to talk about fee disclosure and influence activity?

A Yes.

Q Did you go into any detail?

A No.

Q Did you tell him that you gave the attorney general a list of questions?

A No.

Q Did you tell him that you left the charts with the attorney general?

A No, but, I repeat, he had a copy of the charts.

Q Did you tell him that you left the questions and the charts with the auditor?

A No.

Q Did you discuss with him any of the questions that you had left with either one of the officials?

A No. He showed no interest in the subject.

Q Did Mr. Hurtgen tell you anything else -- strike that.

A Did you tell Mr. Hurtgen anything else in that conversation?
A Not that I recall.

R.25: 33; Burkes deposition, page 155.

Q Those individuals referring to Mr. Hahner, you never told Mr. Hahner you had gone to the attorney general or the auditor?
A No.
Q And you never told Dr. Lillie that you had gone?
A No.
Q And you never told Mr. Martin that you had gone?
A No.
Q And you never told Ms. Busby that you had gone?
A No.
Q You never told Mr. Klauser personally that you had gone?
A No, but, I repeat, I returned all phone calls.

R.25: 34; Burkes deposition, pages 155-56.

/s/ Bruce A. Olsen
Bruce A. Olsen

July 2, 1992

No. 94-1072

JAN 17 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition For Writ Of Certiorari
To The Wisconsin Supreme Court

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT J. GINGRAS
GINGRAS LAW OFFICE, S.C.
131 W. Wilson Street
Suite 610
Madison, Wisconsin 53703
(608) 255-0061
Counsel of Record

STEVEN J. SCHOOLER
LAWTON & CATES, S.C.
214 West Mifflin Street
Madison, Wisconsin 53703
(608) 256-9031

Attorneys for Respondent

January 16, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. WAS THE LAW CLEARLY ESTABLISHED IN JUNE OF 1989 THAT THE FIRST AMENDMENT PROTECTED THE EXPRESSION OF CONCERNS ABOUT THE MISUSE OF PUBLIC PENSION FUNDS DUE TO INFLUENCE PEDDLING TO THE STATE ATTORNEY GENERAL AND THE LEGISLATIVE AUDIT BUREAU?

II. WAS QUALIFIED IMMUNITY PROPERLY DENIED WHERE THERE WAS EVIDENCE THAT THE TERMINATION OF A PUBLIC EMPLOYEE WAS MOTIVATED BY THE EMPLOYEE'S SPEECH TO THE STATE ATTORNEY GENERAL AND THE LEGISLATIVE AUDIT BUREAU?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATUTE INVOLVED vi

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 15

ARGUMENT: REASONS FOR DENYING THE WRIT 16

I. THE PETITION SHOULD BE DENIED WHERE IT FAILS TO DISCUSS THE CONSIDERATIONS SET FORTH IN RULE 10 OF THIS COURT'S RULES OF PROCEDURE 16

II. THE TRUSTEES ATTEMPT TO SHOW BURKES' SPEECH WAS UNPROTECTED BY THE FIRST AMENDMENT BY MISREPRESENTION OF THE RECORD 17

A. *The Trustees Misrepresent The Record As To What They Knew Of Burkes' Speech* 19

B. *The Wisconsin Supreme Court Properly Held That Burkes' Speech Touched Upon A Matter Of Public Concern Pursuant To Clearly Established Law* 21

C. *The Wisconsin Supreme Court Properly Held That Burkes' Speech Satisfied the Pickering Balancing as a Matter of Clearly Established Law* 26

TABLE OF CONTENTS – Continued

Page

III. THE TRUSTEES ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON WHETHER THEY WERE MOTIVATED TO TERMINATE BURKES BECAUSE OF HIS SPEECH 28

CONCLUSION 30

INDEX TO APPENDIX

STATE OF WISCONSIN INVESTMENT BOARD, Minutes of the Special Meeting, Friday, June 23, 1989 .....App. 1

AFFIDAVIT OF BRUCE A. OLSEN (Excerpts) ...App. 5

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 21, 25

Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990) (*en banc*), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2796 (1991) 21

Connick v. Myers, 461 U.S. 138 (1983).....18, 22

Connor v. Reinhard, 847 F.2d 384 (7th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988) 19, 21, 23, 24

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 23

Gorman v. Robinson, 977 F.2d 350 (7th Cir. 1992)..27, 28

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 21

Hesse v. Board of Education, 848 F.2d 748 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989).....24, 27

Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534 (1991) (*per curiam*)..... 25

Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976)..... 29

Marshall v. Porter County Plan. Comm'n, 32 F.3d 1215 (7th Cir. 1994)..... 24

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) 18, 19, 27, 28

O'Brien v. Town of Caledonia, 748 F.2d 403 (7th Cir. 1984)..... 24

Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982)..... 29

Pickering v. Board of Education, 391 U.S. 563 (1968) 16, 18, 22, 26, 27, 28

Piesco v. City of New York, 933 F.2d 1149 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331 (1991) 19, 27, 28

TABLE OF AUTHORITIES – Continued

Page

Rankin v. McPherson, 483 U.S. 378 (1987) 15, 18, 19, 26

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) 24

Roth v. Veteran's Administration, 856 F.2d 1401 (9th Cir. 1988) 21

Waters v. Churchill, ___ U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).....18, 19, 22, 26, 29

Zaky v. Veterans Administration, 793 F.2d 832 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986)..... 24

STATUTE

Supreme Court Rule 10.1 .....15, 16

CONSTITUTIONAL PROVISION

U.S. Const. Amend. 1..... 16, 17, 26, 28

STATUTE INVOLVED

SUPREME COURT RULE 10.1

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

No. 94-1072

In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Supreme Court

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Marshall Burkes ("Burkes") brought this action for damages and reinstatement arising from his termination as executive director for the State of Wisconsin Investment Board ("Investment Board"). (R.2 ¶ 1.) The defendants include various members of the Investment Board, ("Trustees") in their individual and official capacities and M. William Gerrard ("Gerrard"), a lobbyist and real estate broker. (R.2 ¶¶ 5-12.) Burkes alleges he was terminated in retaliation for speaking to the Trustees, the State Attorney General, and Legislative Audit Bureau ("State Auditor")

about the disclosure and amount of finders' fees received by Gerrard, Gerrard's influence among certain Trustees and Gerrard's intimidation of the Investment Board staff. (R.2 ¶¶ 43, 45, 46, 49, 57-61.)

The Investment Board serves as a trustee managing state funds, including over $20 billion in public monies serving 340,000 Wisconsin participants. The funds are mainly pension and retirement funds for public employees. (R.34 ¶ 2.) The Investment Board is governed by an eight-member Board of Trustees. These Trustees have fiduciary obligations toward the management of the assets; they must oversee the investment of assets with the care, skill, and diligence that a prudent person would exhibit acting in a similar capacity with similar resources. (R.34 ¶¶ 2-3.)

Burkes was employed as executive director of the Investment Board from August 20, 1987 until June 23, 1989. As executive director, he was responsible for the management and administration of investments according to the policies adopted by the Board of Trustees. (R.34 ¶¶ 2, 5.)

Burkes' performance through October, 1988 was rated as outstanding. During his entire tenure, Burkes was never formally disciplined, reprimanded, or warned for any weakness or shortcomings in his performance. (R.40 ¶ 7.) Burkes received a $21,000 raise and a $15,000 bonus for his performance in 1987-88. (R.34 ¶¶ 8-9, Exhs. D - H.) Significantly, the Trustees praised his firm treatment of staff. Busby, then chairperson, wrote for the

Investment Board, that he had "shown outstanding ability and willingness to tackle tough issues, such as personnel deficiencies . . . " Busby also wrote,

> In a word, outstanding! You have taken charge and quickly accessed the areas of weakness; addressed deficiencies, particularly in personnel and administration . . .

(R.34, Exh. D.) Busby told Janet Clark, a new employee, in February, 1989, "Marshall Burkes is wonderful, you'll really love working for Marshall Burkes." (R.37 ¶ 5.)

Trustee McMullen wrote:

> Mr. Burkes arrived at SWIB under difficult circumstances. There were personnel issues that had not been adequately addressed, management could be categorized as laissez faire, staff members were functioning independently, and the staff members actually controlled the former Executive Director. . . .
>
> Marshall's performance has been nothing short of outstanding. He has dealt with difficult personnel issues professionally, sensitively, and humanely. His leadership skills have been exemplary – he does not tolerate excuses and demands performance from staff. He is a firm, consistent, excellent manager.

(R.34, Exh. E.) Trustee Gates noted just before Burkes' termination on June 23, 1989 that Burkes was "encouraged to take no backtalk – no mercy approach. . . . " (R.35 Dep. Exh. 65, Bates # 0001540.)

Burkes was first introduced to Gerrard by Hales as a lobbyist and former real estate executive in November of

1987. (R.34 ¶ 11.) Over time, Gerrard's actions and statements raised concerns by Burkes about his influence over the Trustees and staff. These concerns led to the expressions by Burkes before the Trustees, the Attorney General and the State Auditor. (R.34 ¶¶ 46-48, Exhs. A and C.) Gerrard attempted to give Burkes various gifts, including a down coat, football tickets, employment for Burkes' wife and drinks. (R.34 ¶¶ 12, 16, 18-19.) Burkes also learned of close personal relationships between Gerrard and various Trustees, particularly Hales, Klauser and Martin. (R.34 ¶¶ 18-21, 25, and 36.) Hales introduced Gerrard as "his father" on one occasion. (R.36 at Exh. 3, R.35 Zobel Dep. at 122.)

Burkes also learned that Gerrard had a potential to intimidate staff and influence Trustees. Gerrard and Hales both criticized another employee when that employee raised concerns about fees and influence during the pendency of The Company Store refinancing. (R.34 ¶¶ 13, 15, 17.) Gerrard also criticized the former executive director and indicated that Hales should have pushed him out sooner. (R.34 ¶ 15.) The former assistant executive director and current executive director, Pat Lipton, confirmed the legitimacy of these concerns when she told Trustee Gates before Burkes was terminated that staff had been concerned about Gerrard for a long time. (R.35 Dep. Exh. 63, Bates # 0001536.)

Burkes' concerns about Gerrard came to a head in the Spring of 1989 over the investment in The Company Store, the reconsideration of the Santa Clarita project, and the substantial finders' fees Gerrard was earning for merely persuading the Investment Board to fund Lincoln Properties real estate projects. (R.34 ¶¶ 22, 35, 37-43.)

In February 1989, Burkes received a report that The Company Store had suffered a $6 million loss in 1988 and that its line of credit with its bank was drawn above $20 million. Burkes scheduled a meeting with the chief executive officer of The Company Store and Gerrard, inquiring why the Investment Board had not been advised sooner. Burkes reported this meeting to the Trustees. (R.34 ¶ 23, Dep. Exh. 1.) During the course of discussions about The Company Store in March, Gerrard admitted that Klauser had confronted Gerrard about his knowledge of potential problems with The Company Store. Gerrard told Burkes that he was forced to rely on the long-term relationship between himself and Klauser and that Gerrard had never previously lied to Klauser. (R.34 ¶¶ 23, 25.)

At the May Investment Board meeting, a Lincoln Properties real estate project for Santa Clarita was rejected. Gerrard was the loan finder for Lincoln Properties with respect to this project. Following the rejection, Burkes was advised that Martin had been contacted directly by Gerrard and sought reconsideration. (R. 34 ¶ 25.) Martin indicated that Gerrard wanted a special meeting of only certain Trustees that had been critical of the project. (R.34 ¶ 35.) Burkes was very concerned about the manner in which Gerrard contacted the Trustees directly without input of staff, particularly since there was no precedent for reconsideration of a project rejected by the Investment Board. (R.34 ¶ 37.)

During May, Burkes learned that Gerrard was splitting fees with Western Realty and a James Johnson, formerly of Racine, who was apparently a friend of Hales. Burkes learned that the fees to be earned on the Lincoln Properties projects funded and to be funded shortly were

$279,667. (R.34 ¶ 43, Exh. A.) Including Santa Clarita and another project proposed as the South Beach Marina Apartments, the contemplated fees to be earned by Gerrard were $922,167. Burkes was concerned that this was a substantial sum of money for merely serving as a link to the Investment Board. (R.34 ¶ 43.) Also, J. Johnson from Seattle was earning similarly substantial fees. This was again for no management or due diligence review of the project. (R.34 ¶ 38, Exh. A.) Neither the amounts nor the existence of these fees were disclosed to the Investment Board at the time the transactions were approved. *Id.*

Burkes sought to require the disclosure of finders' fees. (R.34 ¶ 38.) While discussing this with Chairperson Martin, Martin indicated that Gerrard had advised that he received fees because "he took staff to lunch and knew how to get deals past Trustees." (R.34 ¶ 35.) Martin had previously commented that he enjoyed meeting with Gerrard and that Gerrard told *him* what was going on at the Board. (R.34 ¶ 36.)

When Burkes advised Hales of the proposed fee disclosure, Hales told Burkes that finders' fees were none of the Investment Board's business. Hales also indicated that he had been contacted by several Trustees complaining that Burkes was vindictive towards Gerrard. Hales further threatened that pursuit of full disclosure would hurt Burkes' future with the Investment Board. (R.34 ¶ 39.)

At the June meeting, the Santa Clarita project was reconsidered and rejected. The disclosure of finders' fees was proposed. Hales vehemently attacked the idea and it died for lack of a second. (R.34 ¶ 40; R.15, Exh. H.) When

the chart disclosing the nature and amount of the fees was presented in executive session, Hales shouted that the Board had already considered those issues. (R.34 ¶ 42.)

Burkes also discussed the matter with Gerrard. Gerrard at first rejected disclosure and reduction, but indicated he would check with the other parties splitting the fees. (R.34 ¶ 44.) Gerrard promised to call Burkes back but never called. *Id.* Shortly after the meeting with Gerrard, Martin asked Burkes in a telephone conversation about the meeting. Yet, Burkes had not previously told Martin about any meeting with Gerrard. Martin did not want to discuss Burkes' concerns about finders' fees but instead stated that Burkes was getting his "tit in a wringer" with Gerrard. (R.34 ¶ 45.) Martin admits making the comment. (R.35 Martin Dep. at 50-51.)

In June 1989, Burkes indicated to the Investment Board that the bank for The Company Store should not be able to escape from its potential loss leaving the Investment Board with its total exposure and that Gillette would not surrender control of the company. Burkes indicated that the strategy was to treat the three major secured lenders, including the bank, as equals, and pressure Gillette to find a new owner. No Trustee indicated that any different strategy should be followed, or criticized the management. (R.34 ¶ 41.)

Burkes was concerned that Gerrard's activities had influenced Trustees with respect to major projects involving large sums of public funds. The Company Store, a Gerrard sponsored investment was in serious financial trouble only months after a major refinancing of over $5

million. Several large Lincoln Properties projects were scheduled to begin funding in July, 1989. (R.34 ¶¶ 43, 46.) Burkes advised Busby, the vice-chairperson, that he was contemplating discussing the finders' fees and influence with the Attorney General. (R.35 Burkes Dep. at 90-96.) Busby admitted in his statement that he was going to the Attorney General was a job performance concern for her. (R.35 Busby Dep. at 54-56.)

On June 19, 1989, Burkes went to the Attorney General and the State Auditor with his concerns. Acting General Counsel for the Investment Board, K. Johnson, accompanied him. Burkes provided a list of questions and the charts previously supplied to the Investment Board detailing the finders' fees for Lincoln Properties. (R.34 ¶¶ 47-48, Exhs. A and C.) Burkes' concerns were the disclosure of finders' fees, the influence of Gerrard upon investment decisions, Gerrard's involvement with The Company Store and its serious financial problems and the fact that several Lincoln Properties projects were scheduled to begin funding in July. (R.34 ¶ 48.) The concerns are reflected in the questions. (R.34 Exh. C.)

Deputy Attorney General Musolf understood that Burkes was concerned and "obviously quite sincere" about finders' fees, their amount and appropriateness, the individuals receiving the fees, and the transactions and influence on the Board. (R.35 Musolf Dep. at 28-30.) Musolf testified that the allegations of influence over investment decisions of public retirement monies was serious, a subject of legitimate inquiry by the Attorney General and that he assigned them to the Division of Criminal Investigation. (R.35 Musolf Dep. at 32-33, 39-40.) Burkes advised Trustee McMullen that he had gone to the

Attorney General because of his concerns about fee disclosure and undue influence. (R.35 Burkes Dep. at 144-48.) Burkes similarly advised Hurtgen that his reasons for speaking to the Attorney General were fee disclosure and influence activity. (R.35 Burkes Dep. at 154.)

Meanwhile, on June 9, the Governor had been sent a letter by facsimile from Dennis McCormick, an employee for a potential purchaser of The Company Store. The letter was apparently provided to Martin who talked to Lipton and then an employee, Francis ("Sandy") Bauch. (R.35 Dep. Exh. 13 at Bates # 004691-94.) On June 12, Martin discussed the letter with Bauch who indicated it was an "unfortunate move" and was concerned that the Investment Board could be reached through the Governor. Martin responded that he would take care of this and that Bauch should keep it confidential. *Id.* (*See also* R.35 Bauch Dep. at 48-49.)

This began a series of secret communications between Bauch, Martin, Lipton and Klauser. Burkes was never advised of their conversations or any criticism concerning The Company Store. (R.34 ¶ 49; R.35 Bauch Dep. at 48-50.)

A meeting to discuss The Company Store was scheduled for June 20, the day Burkes was to leave to attend a seminar in Sausalito, California. Burkes first was advised of the meeting on June 19. (R.34 ¶ 50.) The meeting was scheduled for 5:00 p.m. on Tuesday, June 20. Significantly, at 4:00 p.m. on the same day, June 20, Lipton called a staff meeting and advised that Marshall Burkes had been relieved of his duties. (R.37 ¶ 3.) This was *before* the ostensible meeting to discuss The Company Store where

Klauser appeared with staff comments, and the Board ostensibly voted to relieve Burkes of his duties. (R.15, Exh. I.)

At the June 20 meeting, Bauch presented a chronology of events critical of Burkes. Klauser also appeared with and read negative staff comments made in May. (R.15 Exh. I, R.9 ¶ 15.) Burkes had never previously been advised of the criticisms concerning staff or The Company-Store. (R.34 ¶ 49.) Burkes had never previously been made aware of any criticisms of his performance other than warnings about retaliation if he pursued disclosure of finders' fees. *Id.* In addition, Burkes' speech with the Attorney General about finders' fees was the subject of a "broad range in (sic)" group discussion by the Trustees at the June 20 meeting. (R.35 Zobel Dep. at 50-52.) Significantly, Acting General Counsel K. Johnson, who had been with Burkes to both the Attorney General and the State Auditor, was present for this June 20 meeting when the discussion concerning Burkes' speech to the Attorney General occurred. (R.15 Exh. I.)

In a conversation with Trustee Gates describing the June 20 meeting, Martin indicated that Burkes had been to the Attorney General two weeks ago. (R.35 Dep. Exh. 65, Bates # 0001539; R.35 Dep. Exh. 63, Bates # 0001530; R.35 Gates Dep. at 96-98.) The only other comment about Burkes' performance was the fact that he had been to the Legislative Audit Bureau and The Company Store was discussed. (R.35 Gates Dep. at 96-98.) Lipton advised Gates just before June 23 that one of the issues was finders' fees and confirmed that Burkes had been to the Attorney General concerning fees. (R.35 Dep. Exh. 64, Bates # 0001537; R.35 Gates Dep. at 98.) Trustee Gates

also had a conversation with Burkes. Trustee Gates' notes reflect the following:

> *Marshall*
>
> – Should talk with Paul Saylor for infor. on Gerrard-Hales-Lincoln relationships. SWIB real estate reputation in general.
>
> – Totally oblivious to any issue other than finders fees and real estate deal questions.

(R.35 Dep. Exh. 63, Bates # 0001535, Gates Dep. at 94-95.)

Trustee Gates well understood that Burkes' speech to the Attorney General was a matter of public concern. After his discussion with Chairperson Martin, and possibly after his discussion with Lipton but before the June 23 meeting, Trustee Gates prepared a list of questions which included:

> 6) If finders fees are to become major public issue, how do we handle the issue?

(R.35 Dep. Exh. 65, Bates # 0001539; R.35 Gates Dep. at 87.)

Burkes was advised on June 21 by telephone and on June 22 by telegram that he had been relieved of his duties. No reasons were given. (R.34 ¶ 51; R.15 Exh. J, Bates # 0000835-36.) Burkes was advised by telegram on June 22 that there would be a meeting on June 23 to consider his dismissal. (R.15 Exh. J, Bates # 000835-36.) The only reason given to Burkes, as stated at the June 23 meeting, was to "streamline and improve the efficiency of management at the Investment Board." (R.24 ¶ 54; R.15 Exh. J, Bates # 0000843.)

Although the petition on several occasions states that Burkes never advised the Trustees concerning his speech to the Attorney General and the Legislative Audit Bureau, it is incorrect. The minutes of the meeting taken by and approved by all of the Trustees reflect that Burkes advised the Trustees of his statement to the Attorney General and the Legislative Audit Bureau. The minutes read:

> The Chairman asked Mr. Burkes whether he wanted to say anything.
>
> *Mr. Burkes stated that he feels the Board has an obligation to require full disclosure of finders' fees in SWIB transactions.* He cleared the regular June meeting agenda item on brokers fees with the Chairman prior to the June meeting and made the full extent of finders fees paid in the Lincoln Property Company (LPC) deals known to the Board during the executive session at that meeting.
>
> *Mr. Burkes stressed that he feels that more than $250,000 in fees being paid by LPC to Bill Gerrard in the SWIB transactions is excessive. He questions what Jim Johnson has done to earn his more than $250,000 in fees. He expressed concern about the current financial health of LPC and noted he asked SWIB's outside consultant to check this out.*
>
> *Mr. Burkes then stated he tried to work out an agreement with Bill Gerrard for a reduction of fees. He has been concerned about claims of influence peddling and feels intimidated by Mr. Gerrard.*
>
> *Mr. Burkes closed by noting he asked the Attorney General and the Legislative Audit Bureau for direction in the matter.*

(R. 15, Exh. J, Bates # 0000841, R.Ap. 1-2; emphasis supplied.) The testimony referenced by the Trustees at note 5 on page 11 of their petition actually confirms the above-quoted statement. (R.25 ¶ 75-76, R.Ap. 3-5.)

Rather than expressing surprise over Burkes' discussions with the Attorney General and Legislative Audit Bureau or asking about what Burkes specifically said, the Trustees made repeated statements emphasizing that the termination had nothing to do with finders' fees or issues regarding Gerrard. (R.15 Exh. J, Bates # 0000841-42; R.Ap. at 1-2.)

There were oblique references to problems with Burkes' management by Hales but it is undisputed that no details were provided to Burkes. (*Id.*; R. 34 ¶¶ 51-53.) While the Trustees assert that their displeasure with Burkes' performance had been longstanding, Trustee Hales stated in the meeting, according to the approved minutes,

> Trustee McMullen reiterated that his vote on the motion has nothing to do with the issues regarding Bill Gerrard and disclosure of brokers fees. Trustee Hales agreed, *emphasizing that recently acquired information* on Mr. Burkes' management style led him to his decision on this vote.

(R. 15 Exh. J, Bates # 0000842, emphasis supplied; R.Ap. at 2.) Without further delay, the Trustees voted to terminate Burkes. *Id.* Hales did indicate at the conclusion of the meeting, "I tried to tell you, Marshall." (R.36, A. Burkes Dep. at 105.)

Although denying that Burkes' speech had anything to do with the termination at the June 23 meeting, in

other conversations, the staff and Trustees did indicate that Burkes' pursuit of finders' fees was a basis for his termination. Lipton, who was very involved in the termination and subsequently replaced Burkes as executive director, told Janet Clark that Marshall could have had his job for as long as he wanted but he had to do this thing, referring to Burkes' speech to the Attorney General. (R.37 ¶ 7.) Rev. Woodward, a former Trustee, testified that both Hales and McMullen advised him that Burkes' refusal to let go of the finders' fees issue was a concern involved in Burkes' termination. (R.35 Woodward Dep. at 28-30, 42-44, 223-26.)

Trustees have asserted various reasons unrelated to Burkes' speech as a basis for discharge. Burkes was not advised of these various reasons nor disciplined, reprimanded or counseled concerning any deficiencies in his performance. (R.34 ¶¶ 49-50; R.40 ¶ 7.) Burkes denies the various specific criticisms of his performance with respect to Agri Vest and reprimanding or becoming emotional with Dr. Lillie (R.34 ¶¶ 29-31). Burkes denies misrepresentation concerning Kohlberg, Kravis, & Roberts (KKR). (R.34 ¶ 28.) Burkes denies any inappropriate behavior as to the selection of international managers. (R.34 ¶¶ 32-34.) Burkes also denies various other allegations of unprofessional behavior. (R.34 ¶ 55.)

Indeed, the Trustees' assertion that they had long been concerned about his performance is not only contradicted by the lack of any written evidence of criticism or discipline and by their own evaluations several months earlier, but also by Hales' comment in the minutes that the information as to management problems was

"recently acquired." (R. 15 Exh. J, Bates # 0000841-42; R.Ap. 2-3.)

Thus, much of the asserted bases for dismissal are inconsistent with other statements by staff. Given the outstanding performance evaluations Burkes had received merely eight months earlier in October of 1988, and total lack of expression of the asserted performance concerns before and during Burkes' termination, there is substantial dispute as to the legitimacy and actual existence of these asserted performance problems. (R.34 ¶¶ 8-9, 49-53.)

SUMMARY OF ARGUMENT

Several reasons exist to deny the petition for certiorari before this Court. First, the petitioners have failed to identify or expound upon any of the necessary criteria set forth in Rule 10 of the Supreme Court Rules. This omission alone warrants refusal of the petition.

Second, the Trustees misrepresent the record in claiming that Burkes' speech was unprotected. First amendment retaliation claims against a public employee have been well-established for a decade. *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987). Under these standards, the evidence establishes that the Trustees knew of the content of Burkes' speech before he was terminated. Furthermore, this speech, which dealt with the misuse of public funds, wastefulness and inefficiency, addressed matters of public concern. The form and context of the speech also supports the Wisconsin Supreme Court's ruling that Burkes' speech addressed a matter of public

concern. Moreover, Burkes' speech satisfies the *Pickering* balancing test: the protection of Burkes' First Amendment Rights clearly outweighs the imagined disruptive impact caused by him speaking out. Burkes' high rank with the SWIB is irrelevant to the analysis.

Third, the Trustees cannot claim the protection of qualified immunity. The law has been clearly established that it is unlawful for a public employer to terminate a public employee in retaliation for the employee's protected expression. Thus, where the Trustees caused Burkes' discharge in retaliation for his clearly protected speech, there is no qualified immunity issue.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED WHERE IT FAILS TO DISCUSS THE CONSIDERATIONS SET FORTH IN RULE 10 OF THIS COURT'S RULES OF PROCEDURE.

Rule 10 of the Supreme Court Rules sets forth the considerations relied upon in determining whether to grant a petition for writ of certiorari. The petition never refers to Rule 10.1 or discusses the standards set forth by Rule 10.1. It is therefore difficult to understand why the Trustees seek review, other than that their disagreement with the decisions of the lower courts.

The Wisconsin Supreme Court decision, as well as the trial court decision which it largely affirmed, was carefully crafted and considered all of the assertions made by the Trustees below. An examination of that

decision, the cases upon which it relied, and its discussion of the cases cited by the Trustees, shows that the Wisconsin Supreme Court followed the law as established by prior decisions of this Court and of other circuit courts of appeals. The absence of direct discussion of the standards established by the Rule may not have been inadvertent. Considerations viewed by this Court to be critical in determining to grant certiorari are not present and, accordingly the petition should be denied.

II. THE TRUSTEES ATTEMPT TO SHOW BURKES' SPEECH WAS UNPROTECTED BY THE FIRST AMENDMENT BY MISREPRESENTATION OF THE RECORD.

The Trustees' discussion of the reasons for granting review is a confusing hodgepodge of factual assertions regarding what they knew about Burkes' speech and the law as to First Amendment retaliation claims and qualified immunity. Once the facts are clearly and correctly set forth, and the fundamental principles of applicable law understood, the Wisconsin Supreme Court's decision is merely the application of established principles to the facts of the case. The need for review by this Court is non-existent.

The requirements for a First Amendment retaliation claim against a public employee have been well-established for a decade. There are four essential elements:

(1) the employee's speech touches upon a matter of public concern;

(2) the employee's First Amendment interests in making the speech outweigh the public employer's interests in the effective fulfillment of its responsibilities;

(3) the protected speech was a "motivating factor" in the detrimental employment decision; and

(4) the detrimental employment decision would not have been made "but for" the protected speech.

Rankin v. McPherson, 483 U.S. 378, 383-84 (1987); *Connick v. Myers*, 461 U.S. 138, 144-54 (1983); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-87 (1977); *Pickering v. Board of Education*, 391 U.S. 563, 573-75 (1968).

The first two elements involve a determination of whether the employee's speech is constitutionally protected. *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1884, 128 L.Ed.2d 686 (1994) (plurality op. by O'Connor, J.); *Rankin*, 483 U.S. 384-92. Whether the speech is protected both as to the public concern and *Pickering* balancing are questions of law for the court to decide. *Waters*, 114 S.Ct. at 1884 (plurality op. by O'Connor, J.); *Connick*, 461 U.S. at 148, n.7 and 150, n.10.

The public concern element requires analysis of the employee's speech based upon the content, form and context of speech. *Connick*, 461 U.S. at 147-48. The *Pickering* balancing element requires weighing the employee's First Amendment interest against any injury the speech could cause to the public employer's interests. *Waters*, 114 S.Ct. at 1884 (plurality op. by O'Connor, J.); *Rankin*, 483 U.S. at 388-91. This Court emphasized in *Rankin* that the employer bears the burden of establishing an actual

or threatened disruption caused by the employee's speech. *Rankin*, 483 U.S. at 388-89 (it is not enough for the employer merely to have asserted that the speech did or would cause disruption). *See also Connor v. Reinhard*, 847 F.2d 384, 391 (7th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988).

The third and fourth elements relate to the employer's motivation and whether the speech was the cause of the termination. The employee must establish that the protected speech was a motivating factor, and then the employer has the opportunity to show that the employment decision would have been the same "but for" the protected speech. *Mt. Healthy*, 429 U.S. at 285-87. The third and fourth elements relate to motivation and cause, and thus are not appropriate for qualified immunity. *Waters*, 114 S.Ct. at 1891 (plurality op. by O'Connor, J.); *Gorman v. Robinson*, 977 F.2d 350, 354 (7th Cir. 1992); *Piesco v. City of New York*, 933 F.2d 1149 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331 (1991).

A. The Trustees Misrepresent The Record As To What They Knew Of Burkes' Speech.

The Trustees assert at page 11, n.5:

> Burkes never told the trustees what he told the two public officials, despite two opportunities to do so: once when he informed them of his visits, and once when he was invited to speak to the trustees before he was discharged. R. 25: 34-35: ¶¶ 75-76.

This is untrue and the source referenced actually states the opposite.

Both the minutes of the June 23 meeting and Burkes' testimony concerning his notes for that meeting establish that Burkes told the Trustees the following: he believed the finders' fees were excessive, he questioned what the various individuals did to earn the fees and was concerned about influence peddling and intimidation by the broker earning those fees, Bill Gerrard. (R. 15, Exh. J, Bates # 0000841, R.Ap. 1-2; R.25 ¶ 75-76, R.Ap. 3-5.) The very next statement by Burkes is that he asked the Attorney General and Legislative Audit Bureau for direction in the matter.

There is no dispute Burkes told various Trustees he went to the Attorney General and the Legislative Audit Bureau and stated his concerns about finders' fees and undue influence; he expressly advised Trustee Gates to examine the "Gerrard-Hales-Lincoln relationships." Hales is the Trustee; Gerrard is the broker or finder who is earning incredible fees from the deals; Lincoln is the seller of the real estate. There is no dispute Burkes provided all of the Trustees with a chart showing the exorbitant fees earned by Gerrard from the Lincoln Property deals. There is no dispute that losses contemplated from The Company Store investment were due to a Gerrard-sponsored deal that went bad. There is no dispute that the native language for each of the Trustees is English.

Based upon these undisputed facts, the Trustees clearly knew that Burkes expressed concerns to the State Attorney General and the Legislative Audit Bureau about excessive finders' fees, disclosure of finders' fees, and Gerrard's influence over the Trustees and intimidation of staff. Moreover, the Trustees had ample opportunity to ask either K. Johnson or Burkes any questions they had

about Burkes' speech. The Trustees either knew or reasonably could have determined exactly what was said.

B. The Wisconsin Supreme Court Properly Held That Burkes' Speech Touched Upon A Matter Of Public Concern Pursuant To Clearly Established Law.

The standard for qualified immunity is whether the law was clearly established such that a reasonable public official would understand that the Burkes' speech touched upon a matter of public concern. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The standard for qualified immunity does not require a previous exact duplication of the case, but case law which closely corresponds to the facts. *Anderson*, 483 U.S. at 640; *Connor*, 847 F.2d at 388; *Roth v. Veteran's Administration*, 856 F.2d 1401, 1408 (9th Cir. 1988); *Auriemma v. Rice*, 910 F.2d 1449, 1456 (7th Cir. 1990) (*en banc*), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2796 (1991). The content, form and context of Burkes' speech shows that it touched upon a matter of public concern as a matter of clearly established law.

The Trustees assert this Court needs to review this case because they did not really understand what concerns Burkes was expressing to the State Attorney General and the Legislative Audit Bureau and because Burkes was expressing these concerns to save his employment or that this was merely an internal policy dispute. With respect to what the Trustees knew, the Trustees have simply misrepresented the record. The undisputed facts establish that the Trustees knew in considerable detail what Burkes expressed to the State officials. In addition,

they had the person who accompanied Burkes to both meetings, the acting general counsel for the Investment Board, at the June 20 meeting when they conducted a broad discussion about Burkes' speech to the State Attorney General. Based upon the *Waters* standard of what the employer knew or reasonably should have known, the Trustees had sufficient information to recognize that Burkes' speech involved the actual and potential misuse of public pension funds and undue influence by Gerrard concerning the investment of those funds.

Content of the speech is the most important factor. *Connick*, 461 U.S. at 147-50 (content of one portion of an employee questionnaire otherwise a personal matter touched upon a matter of public concern). The Wisconsin Supreme Court cited numerous cases which have recognized that the misuse of public funds, wastefulness and inefficiency are matters of public concern. (Appellant's Appendix (A.Ap.) 23-24.) The Wisconsin Supreme Court clearly was correct in recognizing that the content of Burkes' speech was protected pursuant to clearly established law. *Pickering*, 391 U.S. at 575-78 (speech asserting that there were excessive school expenditures for athletics touched upon a matter of public concern.)

The form of Burkes' speech also clearly demonstrates that it involved a matter of public concern. As the learned trial court recognized, "[Burkes] took the subject to the State Auditor whose job it is to audit governmental agencies, and to the Attorney General, the highest law enforcement officer in state government." (A.Ap. 68.) The fact that the conversation was private only serves to underscore Burkes' attempt to minimize the disruption his speech would cause, but it clearly was protected.

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 414-17 (1979). As the Wisconsin Supreme Court recognized, there can be little doubt that the form of the speech warrants protection. (A.Ap. 29; citing numerous cases which have held that speech to the appropriate investigative agencies is protected.)

With respect to context, the Trustees mistakenly assert that motive is the critical factor. The *Connick* Court did not establish motive as a factor, but rather context. Indeed, the *Connick* Court itself held certain speech to touch upon a matter of public concern although arising from the same circumstances as other speech it determined did not touch upon a matter of public concern. *Connick*, 461 U.S. at 148-49. Thus, the focus is not on the speaker's motive *per se*, but whether the expression addresses only its personal effect upon the employee. This is exactly how the *Connick* Court concluded that one question concerning pressures to work in political campaigns did touch upon a matter of public concern. *Connick*, 461 U.S. at 149.

Here, Burkes' expression clearly extended beyond any personal impact on Burkes. Burkes discussed not only the disclosure of finders' fees, but also the amount and excessiveness of those fees and a private party's influence upon investment of public pension fund monies. None of these topics provided any direct benefit to Burkes. Assuming the disclosure issue was a policy dispute between Burkes and the Trustees, it was a matter of *policy* and that policy impacted directly upon Gerrard and his influence, as well as the potential use and investment of public pension funds. The topic and its expression were not related to any personal impact on Burkes,

as was the case for the unprotected speech in *Connick*. The Wisconsin Supreme Court realized as much in rejecting the Trustee's assertions as to the personal motive of Burkes. (A.Ap. 27-28.) The court cited *Connick*, *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984) and *Rode v. Dellarciprete*, 845 F.2d 1195, 1201 (3d Cir. 1988).

Contrary to the Trustees' assertions, the Wisconsin Supreme Court considered and rejected the applicability of *Zaky v. Veterans Administration*, 793 F.2d 832 (7th Cir.), *cert. denied*, 479 U.S. 987 (1986) and *Hesse v. Board of Education*, 848 F.2d 748 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989). The Wisconsin Supreme Court considered these cases clearly inapplicable because the expression itself in its context was not focused upon a personal impact on the employee. (A.Ap. at 27-28.) This is also true for the other cases cited by the Trustees at note 4, page 10 of their petition.

The difficulty with the Trustees' insistence upon emphasizing the motive of the speaker is that it makes a factual determination out of a question of law. It is not for a jury to determine whether speech is protected by the First Amendment. To compound matters, the Trustees insist that this factual determination of motive must somehow be incorporated in a qualified immunity analysis as to what a reasonable Trustee would believe was the speaker's motive. As the court held in *Marshall v. Porter County Plan. Comm'n*, 32 F.3d 1215, 1219, "It is often the case that those who speak out are also involved in personal disputes with employers and other employees."

The Trustees' attempt to infuse a standard of what a reasonable employer would think about the motive of the

employee is unsupported by any precedent and totally unworkable. Both *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534 (1991) (*per curiam*) and *Anderson* addressed whether facts known by officers satisfied a probable cause standard. That is a far cry from speculating about the motives of a public employee in speaking and adding to that speculation, the standard of what a reasonable public official would have speculated about the motive. In most instances, an employer will be able to assert some sort of a personal motive by the employee and then claim qualified immunity. The protection of the First Amendment for public employees would be lost.

For example, the Trustees assert that Burkes' motive was to protect his job, although his speech, itself, had nothing to do with protecting his job. Burkes' performance evaluations eight months previously were outstanding. Burkes was never reprimanded or formally disciplined in any way before his termination. The only direct statements by Trustees concerning Burkes' continued employment were threats of retaliation by Trustees Hales and Martin in reaction to Burkes' concerns about finders' fees and Gerrard. The Trustees went to great lengths to keep from Burkes comments by employees he supervised and concerns about his handling of The Company Store. If this were not enough, one of the Trustees concluded after talking to Burkes just before the meeting on June 23, "Totally oblivious to any issue other than finders fees + real estate deal questions." (R.35 Dep. Exh. 63, Bates # 0001535.) Also, Trustee Hales admitted at the June 23 meeting that the information leading him to his decision to terminate was "recently acquired."

The Wisconsin Supreme Court correctly analyzed the content, form and context of the speech. Consideration of all three leads to the conclusion, consistent with clearly established law, that Burkes' speech touched upon a matter of public concern. The Trustees' attempt to incorporate factual matters about motive and reasonable speculation about motive are unsupported by any authority and are wholly unworkable. Accordingly, there is no reason to grant the petition to create a whole new doctrine of qualified immunity.

C. The Wisconsin Supreme Court Properly Held That Burkes' Speech Satisfied the *Pickering* Balancing as a Matter of Clearly Established Law.

Pickering requires balancing of the employee's First Amendment interest against any injury the speech could cause to the public employer's interests. *Waters*, 114 S.Ct. at 1884 (plurality op. by O'Connor, J.); *Rankin*, 483 U.S. at 388-91. The Trustees have no evidence of disruption or potential disruption caused by Burkes' private expressions of concern to the State Attorney General and the Legislative Audit Bureau. Moreover, it is undisputed that Burkes attempted to resolve these issues first with the Trustees and later with Gerrard before expressing any concerns, further minimizing the potential for any disruption.

Trustees' sole argument as to disruptive impact, citing *Rankin*, is that Burkes' position alone was sufficient to outweigh his First Amendment interests. The Trustees did not rely upon this as a basis for termination either;

regardless, a high-ranking position, without more, cannot establish disruption or potential disruption. If that were so, all high-ranking employees have absolutely no First Amendment protection as a matter of law. Again, Trustees cite no authority that rank, without more, automatically establishes disruption or the threat of disruption.

The main thrust of the Trustees' argument is that they should have been able to consider Burkes' job performance in the context of the *Pickering* balancing. Considering the cases cited by the Trustees, including the *Hesse* case which was distinguished earlier in its opinion (A.Ap. 25-26), the Supreme Court recognized that these cases involved repeated disruptive speech which were the employee's performance problem. (A.Ap. 35.) Here, unlike the cases cited by the Trustees, Burkes' speech was not considered by the Trustees to be a job performance problem. It is difficult to imagine how Burkes' speech to the Attorney General and the Legislative Audit Bureau about concerns over disclosure of finders' fees, excessiveness of finders' fees and the influence of Gerrard over investment decisions could be a job performance problem.

What the Trustees really seek, again without any authority, is to import the *Mt. Healthy* "but for" test into the *Pickering* balancing test. The courts where this has been asserted have uniformly rejected it as inappropriate. *Gorman*, 977 F.2d at 355; *Piesco*, 933 F.2d at 1155. The Trustees' position would eliminate the *Mt. Healthy* "but for" requirement because in every instance the employer would assert job performance concerns as part of the *Pickering* balancing. The employer would then assert

qualified immunity to cloak all employment decisions. The case where an employee could show, as a matter of "clearly established law" that various job performance concerns, however concocted, by an employer were insufficient to warrant discipline as a matter of clearly established law would be non-existent.

The Wisconsin Supreme Court properly rejected the Trustees' attempt to import the *Mt. Healthy* "but for" test into the *Pickering* balancing test. There is clearly no split among the circuits or state courts of last resort on this issue and no reason for this Court to consider this assertion by the Trustees.

III. THE TRUSTEES ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON WHETHER THEY WERE MOTIVATED TO TERMINATE BURKES BECAUSE OF HIS SPEECH.

The issues concerning the third and fourth elements of a First Amendment retaliation claim, motive and cause, are not issues of law, but rather issues of fact. The law has been clearly established since 1968 that it is a violation of the First Amendment for a public employer to cause the termination of a public employee in retaliation for the employee's protected expression. *Pickering*, 391 U.S. at 573-75. Thus, where the Trustees caused Burkes' discharge in retaliation for speech which was clearly protected, there is no qualified immunity issue. The Trustees point to no decision which holds otherwise. In fact, the courts of appeals have been unanimous in rejecting such assertions. *See Gorman*, 977 F.2d at 355; *Piesco*, 953 F.2d at

1155; *Peacock v. Duval*, 694 F.2d 644, 646 (9th Cir. 1982); *Mabey v. Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976).

This Court's holding in *Waters* was consistent with the earlier decisions of the courts of appeals. In *Waters*, this Court held it could not decide as a matter of law, as a matter of qualified immunity, which speech the employer relied upon in terminating the employee. *Waters*, 114 S.Ct. at 1891 (plurality op., O'Connor, J.) and 1893 (Souter, J., concurring). Where there was a factual issue was to motive and as to whether the employee would have been terminated regardless of the protected speech, the resolution of that issue was for the factfinder. *Id.*

Here, there is substantial evidence establishing that the Trustees terminated Burkes for his speech to the Attorney General and the Legislative Audit Bureau. There is substantial evidence that Burkes' asserted performance problems were concocted as an excuse for the retaliation. Perhaps the best example was the Trustees' asserted reliance upon the complaints of some, but not by any means all, staff members. The Trustees encouraged Burkes to be tough with the staff members and praised him in his previous evaluations for that conduct. After Burkes speaks to the Attorney General and the Legislative Audit Bureau, the Trustees then fire Burkes for being tough on staff?!

The Wisconsin Supreme Court correctly applied the law. The courts of appeals and this Court have concluded that qualified immunity has no application in decisions concerning motive or cause, because these are not legal

standards. The attempt to impose a requirement of qualified immunity onto such requirements would be incredible and allow employers to defend by concocting job performance problems in every case totally eliminating the protection of the First Amendment for public employees. Thus, the petition should be denied.

CONCLUSION

The considerations which warrant review by this Court are not present where the decision of the Wisconsin Supreme Court followed the decisions of this Court consistent with decisions in similar cases by the circuit courts of appeals. Accordingly, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT J. GINGRAS
GINGRAS LAW OFFICE, S.C.
131 W. Wilson Street
Suite 610
Madison, Wisconsin 53703
(608) 255-0061
Counsel of Record

STEVEN J. SCHOOLER
LAWTON & CATES, S.C.
214 West Mifflin Street
Madison, Wisconsin 53703
(608) 256-9031

Attorneys for Respondent

January 16, 1995

APPENDIX

STATE OF WISCONSIN INVESTMENT BOARD
Friday, June 23, 1989
Minutes of the Special Meeting
The Milwaukee Athletic Club
785 North Broadway
Milwaukee, Wisconsin
(continued)

II. Closed Session

The Chairman asked Mr. Burkes whether he wanted to say anything.

Mr. Burkes stated that he feels the Board has an obligation to require full disclosure of finders' fees in SWIB transactions. He cleared the regular June meeting agenda item on brokers fees with the Chairman prior to the June meeting and made the full extent of finders fees paid in the Lincoln Property Company (LPC) deals known to the Board during the executive session at that meeting.

Mr. Burkes stressed that he feels that more than $250,000 in fees being paid by LPC to Bill Gerrard in the SWIB transactions is excessive. He questions what Jim Johnson has done to earn his more than $250,000 in fees. He expressed concern about the current financial health of LPC and noted he asked SWIB's outside consultant to check this out.

Mr. Burkes then stated he tried to work out an agreement with Bill Gerrard for a reduction of fees. He has been concerned about claims of influence peddling and feels intimidated by Mr. Gerrard.

Mr. Burkes closed by noting he asked the Attorney General and the Legislative Audit Bureau for direction in the matter.

Trustee McMullen emphasized that no one is trying to hide anything. He asked why the supposed financial difficulties of LPC had not been addressed previously – during the due diligence period. Mr. Burkes asserted that the issue had been discussed previously.

Trustee Gates stated he is satisfied that the finders' fees issue is not a factor in the action the Board is now considering. Mr. Burkes commented that he is being honest about his feelings. He has tried to work things out with Mr. Gerrard and feels intimidated.

Mr. Burkes then noted there are no real estate professionals on the Board and stated he feels the Board is vulnerable with real estate. Although this is the smallest investment division, the Board has been more involved in real estate than any other area. He also sees the Wisconsin Private Placements program as an area of vulnerability.

In response to a question from Trustee Lillie about status of the LPC deals, Mr. Burkes explained the Board has approved four LPC joint ventures, and a San Francisco apartment building proposal is now being discussed. The approved deals total $40-50 million, but three have not yet been funded.

Trustee Klauser asked Mr. Burkes whether he had approved the LPC deals brought to the Board. Mr. Burkes acknowledged that he had, but stated payment of fees was subject to due diligence.

Trustee Busby emphasized her agreement with statements by other Trustees that the brokers' fees issue has nothing to do with the question before the Board.

Trustee Busby moved to dismiss Marshall Burkes from his position as Executive Director of the State of Wisconsin Investment Board, effective immediately.

Trustee McMullen again stated that it should be made clear that this action is not being taken because of the fees issue. The Chairman explained that the action of the Board is being taken to streamline and improve the efficiency of management at the Board. Trustee Hales noted that the Board has become aware of problems with Mr. Burkes' management at the Board.

Trustee McMullen seconded the motion to dismiss.

Trustee Hales inquired about severance pay. Mr. Burkes responded that, as a matter of principal, he does not feel it is appropriate to bargain for a letter of resignation.

The Chairman asked Mr. Burkes to clarify whether he wants to bargain over an arrangement for his resignation. Mr. Burkes stated that he does not want to bargain.

Trustee McMullen reiterated that his vote on the motion has nothing to do with the issues regarding Bill Gerrard and disclosure of brokers fees. Trustee Hales agreed, emphasizing that recently acquired information on Mr. Burkes' management style led him to his decision on this vote. He sees the action being taken by the Board as crucial to improved management of the Board.

The Chairman directed that the roll be called:

Mr. Martin	– Aye	Ms. Busby	– Aye
Mr. Hales	– Aye	Mr. Klauser	– Aye
Mr. Lillie	– Aye	Mr. McMullen	– Aye
Mr. Hahner	– Aye	Mr. Gates	– Aye

There being 8 Ayes and 0 Nays, the Chairman declared the motion to dismiss the Executive Director passed.

The Chairman stressed that this action is being taken by the Board to streamline and improve the efficiency of management at the Investment Board.

There being no further business, it was moved by Trustee Hahner and seconded by Trustee Klauser to adjourn the meeting.

The Chairman directed that the role be called:

Mr. Martin	– Aye	Ms. Busby	– Aye
Mr. Hales	– Aye	Mr. Klauser	– Aye
Mr. Lillie	– Aye	Mr. McMullen	– Aye
Mr. Hahner	– Aye	Mr. Gates	– Aye

There being 8 Ayes and 0 Nays, the Chairman declared the meeting to be adjourned at 2:30 P.M.

Respectfully submitted:

/s/ Gary I. Gates
Gary I. Gates, Secretary

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | DANE COUNTY

MARSHALL BURKES,

Plaintiff,

vs.

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAURENN J. BUSBY, RICHARD H. LILLIE, NICHOLAS HURTGEN,

Defendants,

M. WILLIAM GERRARD,

Defendant-Third-Party Plaintiff,

ACCELERATION NATIONAL INSURANCE COMPANY and RURAL MUTUAL INSURANCE COMPANY,

Third-Party Defendants.

Case No. 89-CV-4227
R. 25, pp. 75-76

AFFIDAVIT OF BRUCE A. OLSEN

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

BRUCE A. OLSEN, being first duly sworn, on oath deposes and says:

75. In his April 24, 1992 deposition, Burkes was asked the following questions and gave the following answers:

Q Were you called back in California during the week of June 19?
A Yes.
Q And you were called back to what location?
A A meeting place in Milwaukee.
Q Can you remember what the meeting place was?
A A private club that Maureen Busby belongs to, which I believe is the athletic club.
Q How did you get to Milwaukee?
A Flew in by way of Chicago on the red-eye special.
Q On what day?
A That morning.
Q The morning of the 23rd?
A Yes.

Burkes deposition, page 160.

In his April 24, 1992, deposition, Burkes was asked the following questions and gave the following answers:

Q When did you arrive at the Milwaukee Athletic Club?
A About 30 minutes before the appointed meeting time.
Q What did you do before the meeting began?

15 A Called an attorney who I had communicated with the
16 previous day.
17 Q And who was that?
18 A Mr. Gingras.
Burkes deposition, page 161.

76. In his April 24, 1992, deposition, Burkes was asked the following questions and gave the following answers:

11 Q Tell me everything you said at the meeting.
12 A I think I have forwarded the notes on that meeting.
13 (Exhibit 32 is marked for identification)
14 Q Show you what's been marked as Exhibit 32, Mr. Burkes,
15 and ask you whether you can identify this.
16 A Yes.
17 Q What is it?
18 A These are my scribblings that I did either just before
19 or during the meeting before giving a statement.
20 Q Is this the statement that you made to the trustees?
21 A These are the notes which I used as background notes,
22 and in this case I because of the nature of the meeting
23 probably made more direct referral than I normally
24 would with background notes.
25 Q What does that mean?
1 A That means that I probably had these closer at hand and

not necessarily in my black notebook and would have made more direct reference to these notes.

Q Do you mean that you would have followed these notes carefully in your remarks?

A Yes.

Q I wonder if you might help me out and read all the notations on this paper.

A "Text of Statement, 6-23-89."

Q Up at the very top right-hand corner there is –

A I'm thinking about the open meeting which we've just discussed.

MR. AXELROD: Read it.

Q Read it, please.

A "Open meeting request," and I can't see what the next word is.

Q Over on the right-hand side?

A On the right-hand side is "By Marshall Burkes, Executive Director."

Q "Text of Statement, 6-23-89." Next notation is?

A "Chris George of Save the Children has disappeared into Gaza yesterday, a true American Professional and former associate."

Q Next notation?

A "1. Full disclosure is our fiduciary obligation, and I

cleared that agenda item with Chairman Martin."

Q Next?

A "Once I knew of the fee splitting, no written representation and the magnitude of the so-called 'Finders Fee,' I felt each trustee should know in executive session."

Q Next notation?

A "Over one quarter million dollars to Bill Gerrard is excessive, and I do not know what" –

MS. ARTS: Did you skip a word, Mr. Burkes, in that next line after the word "I"?

A "I still do not know what Jim Johnson of Seattle did to earn over a quarter of a million dollars. Lincoln Property Company in California may be in desparate financial health. I have requested a current report from Paul Saylor of Institutional Property Consultants in Atlanta."

Q And the next notation?

A "I tried in good faith to work out an agreement with Bill Gerrard last week for now and for future relations. He did not," not is underlined, "get back to me as promised, after talking to several trustees."

Q The next notation?
A "With this 'influence peddling and intimidation,' I felt it prudent to ask the auditor general and attorney generals' offices for advice and clearance of the pending transactions."
Q The next notation?
A "I trust that you, the trustees, will not retaliate against me."
Q Next notations?
A Something about visit with Woodward. "Tom would keep the proper perspective if he was still here. Ann says that miscommunication can be corrected."
Q Next notation?
A "What are your specific reasons?"
Q And the next notation?
A "No on resignation."
Q You would have stuck pretty closely to this text in your statement to the board?
A Yes.
Q Is there any part of this statement that you did not tell the board about?
A Not that I recall.

Burkes deposition, pages 165-68.

(3)

FILED
JAN 30 1995
OFFICE OF THE CLERK

No. 94-1072

In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE, and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

BRUCE A. OLSEN
Assistant Attorney General
Counsel of Record

ROBERT A. SELK
Acting Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2580

Attorneys for Petitioners

January 30, 1995

13 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I.

The Trustees Had a Reasonable Belief That Burkes' Speech Was Not Protected 1

II.

Burkes' Response Makes No Arguments Refuting the Reasons The Writ Should Be Granted 7

TABLE OF AUTHORITIES

Cases

Anderson v. Creighton,
483 U.S. 635 (1987) 2, 9

Davis v. Scherer,
468 U.S. 183 (1984) 8

Hunter v. Bryant,
502 U.S. 224, 112 S.Ct. 534 (1991) 2, 9

Mitchell v. Forsyth,
472 U.S. 511 (1985) 7

Pickering v. Board of Education,
391 U.S. 563 (1968) 2, 9

Waters v. Churchill, ___ U.S. ___, 114 S.Ct. 1878,
128 L.Ed.2d 686 (1994) 2, 4

Constitutional Provision

U.S. Const. Amendment 1 ..... 2, 10

Supreme Court Rule

Supreme Court Rule 10.1 7–8

No. 94-1072

In The

Supreme Court of the United States

October Term, 1994

JAMES R. KLAUSER, EUGENE G. MARTIN, EDWARD E. HALES, MAUREEN J. BUSBY, RICHARD H. LILLIE, and NICHOLAS HURTGEN,

Petitioners,

v.

MARSHALL BURKES,

Respondent.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I.

The Trustees Had a Reasonable Belief that Burkes' Speech Was Not Protected.

The essential facts before this Court are what reasonable officials in the position of the trustees could reasonably believe about the content, form and context of Burkes' statements to the Attorney General and the State Auditor, and what reasonable officials in the position of

the trustees could reasonably believe to be the facts in the balance of interests required by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and the cases in the circuits interpreting *Pickering*. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (immunity to be decided on the basis of "information the [officials] possessed"); *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 1889, 128 L.Ed.2d 686 (1994) (First Amendment analysis should proceed on the basis of "the facts as the employer reasonably found them to be"); *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 536 (1991) (if there is any reasonable basis in the facts to conclude that defendants acted within the law, they are immune).

Burkes does not dispute the limited information he gave the trustees regarding his speech activity[1], except he argues that the chart showing the alleged fees and the statement he made to the trustees on the day he was fired should have put them on notice that he could not be fired without violating the First Amendment. Neither of those pieces of information would have led a reasonable trustee to believe that Burkes was speaking on a matter of public concern, or that his speech interests outweighed their duty to effectively manage the agency in the public interest.

---

[1] Burkes acknowledges his statements to the trustees immediately after his visits with the Attorney General and State Auditor (A. App. 94–99; Burkes' response 8–9), and at the June 23, 1989, meeting where he was fired (R. App. 1, 7–10). He does not dispute he told the trustees that he knew of no illegal or even inappropriate acts on the part of anyone (R.14:4:¶6). He concedes that the substance of his "concerns" were "reflected in the [list of] questions" he left with the two officials (Burkes' response 8); and admits that the trustees did not know about those questions at the time they fired him (A. App. 95–98).

Burkes gave the trustees charts at the June board meeting purporting to "disclos[e] the nature and amount of [Mr. Gerrard's] fees" (Burkes' response 7). The charts did nothing of the sort. In May, 1989, Burkes ordered Paul Fanfera, head of the Investment Board's real estate division, to prepare a chart of the real estate transactions in which Mr. Gerrard was known to be involved, without regard for whether those projects had ever been approved or disapproved by the Investment Board (R.19:¶¶2, 28–30). All of the amounts shown on the charts, whether the project was approved or disapproved, were in line with industry practice (R.19:7:¶30). Indeed, of the projects listed on the charts, the Board had funded only one (R.34:¶¶42–43: Exhs. A, B).[2] Contrary to Burkes' averments (Burkes' response 6; R.34:¶38), the brokerage commissions on the projects at issue were always available to the Board because they were part of the project budgets (R.19:¶30; R.28:¶13).

Burkes stated in his deposition that he was ignorant of practices in the real estate industry.[3] The

---

[2] The chart ordered by Burkes shows that one project had been funded in the approximate amount of $10.5 million, for which three real estate brokers equally shared a $216,000 commission (2% of total price) (R.35:¶42: Ex. A).

[3] Burkes stated in his deposition that he was ignorant of practices in the real estate industry (R.25:13–14:¶34):

Q Do you have any general knowledge of what the practice is in the real estate industry regarding the evaluation of fees?
A No, I'm not an expert in that area.
Q Do you have any experience in your past employment regarding the evaluation of the magnitude of fees?
A Not specifically.
****

Board understood, as Burkes apparently did not, that a real estate broker is paid by and obligated to the seller, not the buyer; that commission splitting is an accepted practice in the real estate industry; and that it would be inappropriate for the Board to rely on any work done by a seller's broker (R.19:¶¶25–26; R.28:¶¶12, 15). Moreover, on June 23 Burkes responded to a question from one of the trustees by admitting that he himself had approved the real estate transactions in question, and admitting that three of the four transactions had not yet been funded (R. App. 2, para. 5).

It was reasonable for the trustees to view the charts as an inaccurate and misleading piece of information in light of their knowledge about their own practices and the practices in the real estate industry. No reasonable trustee would have inferred from the charts that there was a need for disclosure, that anyone was receiving excessive fees, that the Board should be deciding what fees were paid to brokers by its investment partners, or that the one brokerage fee for an approved project shown on the charts was an example of influence. The reasonable conclusion was that the charts were nothing more that a self-serving reiteration of the real estate policy disagreement Burkes had with the trustees two weeks earlier (R.15:5:¶13, Exh. H). *Waters*, ___ U.S. at ___, 114 S.Ct. at 1888 (government manager should be permitted to exercise professional judgment about credibility and character in determining what conclusions to draw from the circumstances).

Burkes refers the Court to the text of the statement he read to the trustees at the June 23, 1989,

---

Q Do you know what the industry practice is in the real estate industry about evaluating, about the buyer's evaluation of the seller's brokers fee?

A Not specifically.

meeting just before he was discharged (R. App. 7–10).[4] As demonstrated in the following paragraphs, however, the content and context of Burkes' June 23 statement added nothing to what the trustees already knew about Burkes' speech: they knew only that he had expressed concern about the fee disclosure policy they had recently considered and rejected, had expressed concern about unspecified "influence," and had assured the trustees that he had no knowledge that anyone had done anything illegal or even improper (Cert. petition, pp. 5–6; A. App. 94–99; R.14:4:¶6).

Burkes attempts to breathe content into his vague assertion of "concern" about "influence" by insinuating that his June 23 statement to the trustees should have alerted them that he was warning them about a matter of public concern; i.e., "Mr. Gerrard's influence over the trustees and intimidation of staff" (Burkes' response 20). The trustees refer the Court to Burkes' appendix, which demonstrates otherwise (R. App. 9–10). The meeting minutes indicate that the trustees understood Burkes only to say that "[Burkes] has been concerned about claims of influence peddling and feels intimidated by Mr. Gerrard" (R. App. 1).

Contrary to Burkes' assertion, he did not tell the trustees on June 23 that Mr. Gerrard had influence over the them, and did not tell the trustees that Mr. Gerrard had intimidated staff. He did not tell the trustees that he had made such accusations to the two state officials he

---

[4] Burkes did not argue before the Wisconsin Supreme Court that his June 23 statement added anything to the trustees' knowledge of the content of his speech.

visited a few days prior.[5] Instead, Burkes told the trustees that Mr. Gerrard did not keep a promise to respond to Burkes, told them he felt intimidated by Mr. Gerrard, and told them he asked the two officials to approve the pending real estate transactions.

None of Burkes' June 23 statements can be fairly characterized as "attempting to focus the attention of two agencies upon the Investment Board's use, or possible misuse, of public funds," as suggested by the Wisconsin Supreme Court (A. App. 19). Mr. Gerrard's alleged failure to keep a promise to Burkes is not a matter of public concern, nor is Burkes' feeling of intimidation by Mr. Gerrard. If Burkes wanted to suggest to the trustees that anyone had done anything improper, he did not do so on June 23. In short, Burkes' June 23 statement to the trustees corroborates their position that they knew only that Burkes had expressed vague concerns about the fee disclosure policy they rejected two weeks prior and about unspecified "influence," all the while maintaining that no one had done anything illegal or improper. The trustees learned nothing new from what Burkes said on June 23.

---

[5] Burkes suggests that the trustees probably knew what he said to the two officials, because agency legal counsel Keith Johnson attended both his visits to the officials and the special trustee meeting on June 20, citing to the record (Burkes' response 10). The record establishes that staff, including Messrs. Zobel and Bauch, were present for the discussion of Burkes' mismanagement of The Company Store loan renegotiation, but not for the trustees' other discussion about Burkes. The minutes of the June 20 meeting state: "The trustees asked staff to leave the meeting and engaged in a lengthy discussion of [Investment Board] personnel and management issues in general. They also discussed personnel and management issues relating to the Executive Director" (R.15:Ex. I).

Burkes' response concentrates virtually all of its attention and arguments on alleged (and disputed) facts and inferences from those facts which, if believed, would tend to show that the reasons proffered by the trustees for Burkes' discharge were pretextual, and that they were actually motivated to discharge him because of his speech activities. Burkes asserts that these factual inferences on the merits of his retaliation claim defeat the trustees' qualified immunity. However, Burkes ignores the clearly established law that motivation is not an issue when deciding qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) ("[A] claim of immunity is conceptually distinct from the merits of the plaintiffs' claim that his rights have been violated"). This Court can therefore disregard Burkes' assertions of fact and inference regarding the trustees' motivations for his discharge. The qualified immunity issues stated in the trustees' petition do not depend in any way upon their motivations for discharging Burkes.

II.

Burkes' Response Makes No Arguments Refuting the Reasons the Writ Should Be Granted.

Burkes' cursory discussion of the legal issues in this case ignores the trustees' arguments that the writ should be granted because the Wisconsin Supreme Court's analysis unlawfully inhibits public employers from exercising their judgment in the public interest.

Burkes' assertion that the trustees' petition does not comply with Rule 10.1 (Burkes' response 16), is without merit. The questions presented and the entire body of the petition demonstrate that the petition meets the criteria of Rule 10.1(b) and (c).

Burkes' response ignores the trustees' argument that courts must not substitute their hindsight view of the circumstances surrounding a discharge for what reasonable public employers knew at the time the action had to be taken. Burkes does not explain why the Wisconsin Supreme Court's rejection of the reasonable inferences made by the trustees, in favor of inferences drawn solely in Burkes' favor, is appropriate under existing precedent. Burkes does not explain how the Wisconsin Supreme Court's analysis furthers the policy of qualified immunity to encourage fearless decisionmaking in the public interest. Burkes argues only that the inferences about his speech most favorable to him support the conclusion that he was speaking on a matter of public concern (Burkes' response 21–26).

Burkes criticizes the precedent cited by the trustees which supports the legality of the discharge by arguing that the precedent was not "closely analogous" (Burkes response 22–24). That argument makes the same fundamental burden-shifting error that was made by the Wisconsin Supreme Court. The trustees have no obligation to produce precedent which permits them to fire Burkes; Burkes must produce closely analogous precedent which prohibited the discharge. *Davis v. Scherer*, 468 U.S. 183, 197 (1984) (plaintiff bears burden of showing clearly established law). Only Burkes had any obligation to produce closely analogous cases which would have put the trustees on notice that they could not discharge the key managerial employee in the agency when they reasonably believed he had mismanaged the agency to the point of breakdown if they knew the employee had expressed vague concerns about agency policy and influence.

Burkes does not defend the propriety of the inference-drawing procedure used by the Wisconsin Supreme Court on the qualified immunity standard. He argues instead that the trustees knew more than they

have claimed, but his arguments in that regard are unconvincing in light of the faulty information on the charts and the failure of Burkes himself to tell the trustees what he said when he had the opportunity to do so on June 23. Burkes then proceeds to eliminate *Pickering* factors which favor the trustees on the theory that summary judgment methodology permits courts to consider only those inferences in Burkes' favor. For instance, he argues that the trustees could not consider as part of the *Pickering* balance their beliefs about his abysmal performance, their beliefs about the management breakdown that had occurred, the importance of Burkes' position to the effective functioning of the agency, or their beliefs about the potential disruptiveness of his statements (Burkes' response 26-27). Burkes does not explain how a public employer, invariably faced with competing inferences in these situations, could ever act if the speech was arguably on a matter of public concern. The inference drawing procedure advocated by Burkes and adopted by the Wisconsin Supreme Court reads the *Pickering* balancing test out of the immunity analysis where an employee's speech is arguably on a matter of public concern.

Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534 (1991), establishes the proper standard for qualified immunity on summary judgment where the reasonable belief of the decisionmaker is an element of the constitutional claim. Burkes dismisses *Hunter* and *Anderson v. Creighton*, 483 U.S. 635 (1987), as probable cause cases (Burkes' response 25). Yet, both of these cases deal with the core question presented in the petition, which is whether a summary judgment motion based on qualified immunity must be measured against the decisionmaker's objectively reasonable beliefs even if the inferences are unfavorable to the plaintiff, or whether a court may consider only those factual inferences favorable to the plaintiff. The trustees urge this Court to accept this case for review, and make explicit the holdings

implied by *Hunter* and *Anderson*, that public employers are entitled to qualified immunity in First Amendment retaliation claims if any reasonable inferences from the facts support the lawfulness of an employment action.

Respectfully submitted,

BRUCE A. OLSEN
Assistant Attorney General
Counsel of Record

ROBERT A. SELK
Acting Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2580

Of Counsel:

WALTRAUD A. ARTS
Quarles & Brady
Post Office Box 2113
Madison, WI 53701
(608) 251-5000

TERRY E. JOHNSON
Peterson, Johnson & Murray
731 N. Van Buren Street
Milwaukee, WI 53702
(414) 271-8800

Attorneys for Petitioners Klauser, Martin, Busby, Lillie and Hurtgen

T. CHRISTOPHER KELLY
145 W. Wilson Street
Madison, Wisconsin 53703
(608) 255-6607
Attorney for Petitioner Edward E. Hales

January 30, 1995